Affirmed
Judge Swayne
Decided
Judge Davis
Submitted
Jany 29

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~470~~. 238

MARTIN McNITT AND RODOLPHUS F. TAINTOR, PLAINTIFFS IN ERROR,

vs.

ASA TURNER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED DECEMBER 5, 1871.

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SUPREME COURT OF THE UNITED STATES.

No. 479.

MARTIN McNITT AND RODOLPHUS F. TAINTOR, PLAINTIFFS IN ERROR,

vs.

ASA TURNER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of Illinois, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Asa Turner, plaintiff, and Martin McNitt and Rodolphus F. Tainton, defendants, a manifest error hath happened to the great damage of the said Martin McNitt and Rodolphus F. Taintor, as by their complaint appears, we, being willing that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the first Monday of
b December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, this sixth day of July, in the year of our Lord one thousand eight hundred and seventy-one, and of our independence the ninety-sixth year.

[SEAL.] J. A. JONES,
Clerk of the Circuit Court of the United States for the Southern District of Illinois.

1 Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, before the Hon. David Davis, presiding judge, and the Hon. Samuel H. Treat, district judge of said district, on Saturday, the first day of July, at the June term of said court, in the year of our Lord one thousand eight hundred and seventy-one, and of our independence the ninety-fifth year.

J. A. JONES, *Clerk.*

ASA TURNER
vs. } In ejectment.
MARTIN MCNITT.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Asa Turner, a citizen of the State of Missouri, plaintiff, puts in his place Messrs. Skinner and Marsh, his attorneys, against Martin McNitt, a citizen and resident of the said southern district of Illinois, defendant in a plea of trespass and ejectment.

2 SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that heretofore, to wit, on the third day of July, in the June term of said court, in the year of our Lord one thousand eight hundred and sixty-eight, in open court, came said plaintiff by his attorneys, and filed in the clerk's office of said court his declaration in ejectment against the defendant, together with a notice in writing

thereto attached, and also an affidavit of a due service of a true copy of said declaration and notice upon the defendant; and also at the same time filed his bond for costs in said entitled cause; which said declaration, notice, affidavit, and bond for costs are in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA,
Southern District of the State of Illinois, ss:

United States circuit court, southern district of Illinois. June term, 1868.

Asa Turner, who is a citizen of the State of Missouri, by Skinner & Marsh, his attorneys, complain of Martin McNitt, who is a citizen
3 of said southern district of Illinois, in a plea of trespass and ejectment, for that whereas, heretofore, to wit, on the first day of June, in the year eighteen hundred and sixty-eight, (A. D. 1868,) at and within the county of Brown and said State of Illinois, the said plaintiff was possessed, as of his own demesne, in fee simple, of that certain tract or parcel of land, with the appurtenances, situate in the county of Brown, in the said State of Illinois, and described as follows, to wit: The southeast quarter of section four, (4,) in township one (1) south, of range four (4) west, in said county of Brown, which said premises exceed in value the sum of five hundred dollars, and which the said plaintiff claims in fee-simple. And the said plaintiff being so possessed thereof, the said defendant afterwards, to wit, on the same day and year last aforesaid, entered into said premises and ejected the said plaintiff therefrom, and from the time last aforesaid has unlawfully withheld, and does now unlawfully withhold, from the said plaintiff the possession thereof, to the damage of said plaintiff of the sum of
4 five hundred dollars; therefore he brings this suit, etc.

SKINNER & MARSH,
Att'y' for Plaintiff.

(Indorsed:) Filed July 3rd, 1868. J. A. Jones, clerk.

Notice.

To Martin McNitt, the above-named defendant:

You are hereby notified that the declaration, with a copy of which you are now herewith served, and to which this notice is attached, will be filed in the circuit court of the United States for the southern district of Illinois on the third day of July, 1868, of the June term of said court, A. D. 1868, and that, upon filing the same, a rule will be entered requiring you to appear and plead to the said declaration within twenty days after the entry of said rule; and that, if you neglect so to appear and plead, a judgment by default will be entered against you, and the plaintiff will recover possession of the premises specified in said declaration.

Dated this 30th day of June, A. D. 1868.

SKINNER & MARSH,
Att'y' for Plaintiff.

5 (Indorsed:) Filed July 3rd, 1868. J. A. Jones, clerk.

Affidavit.

STATE OF ILLINOIS,
Adams County, ss:

Charles O. Wilcox, being duly sworn, says that, on the first day of July, 1868, he served a declaration, together with a notice thereto subjoined, of which said declaration & notice the within are copies, upon Martin McNitt, the defendant therein named, by delivering the same to him personally.

CHA'S O. WILCOX.

Subscribed & sworn to before me this 2d day of July, 1868.
Witness my hand & seal notarial, at the city of Quincy, in said county.
[L. S.] WALTER SCOGGAN,
Notary Public.

(Indorsed.) Filed July 3rd, 1868. J. A. Jones, clerk.

Bond for costs.

I do hereby enter myself security for costs in the within-men-
6 tioned cause, & acknowledge myself bound to pay, or cause to be paid, all costs which may accrue in said cause, either to the opposite party or to any officer of the court, in pursuance of law. Dated June 30, 1868.

OTIS A. TURNER.

(Indorsed:) Filed July 3d, 1868. J. A. Jones, clerk.

Whereupon, on the same day of the month, in the term and year aforesaid, the following proceedings were had in said court in said entitled cause and entered of record, to wit:

Order to docket, &c.

ASA TURNER
v. } In ejectment.
MARTIN MCNITT.

Now comes the plaintiff, by Messrs. Skinner and Marsh, his attorneys, and files his declaration in ejectment against the defendant, together with a notice in writing thereto attached, and also an affidavit of a due service of a true copy of said declaration and notice upon the defend-
ant; and upon reading and filing the same, it is ordered by the
7 court, on motion of the plaintiff, that the cause be docketed and the defendant be ruled to plead thereto within twenty days, or that his default be entered. And on like motion it is further ordered that this cause be continued.

Afterwards, to wit, on the fifteenth day of July of the year aforesaid, came said defendant, by E. H. Buckley, esq., his attorney, and filed in said clerk's office his plea herein; which said plea is in the words and figures following, to wit:

Plea.

In the United States circuit court of the southern district of Illinois, of the June term, 1868.

ASA TURNER
v.
MARTIN MCNITT. } In ejectment.

And now comes the defendant, Martin McNitt, by E. H. Buckley, his attorney, and says that he is not guilty of unlawfully withholding the *the* premises claimed by the plaintiff, as alleged in his declaration herein; and of this he puts himself upon the country, &c.

8 E. H. BUCKLEY.
Att'y for Def't.

(Indorsed:) Filed July 15, 1868. J. A. Jones, cl'k.

And afterwards, to wit, on the eleventh day of June, at the June term of said court, in the year of our Lord one thousand eight hundred and sixty-nine, the following further proceedings were had in said court in said cause and entered of record, to wit:

Order for hearing.

ASA TURNER
v.
MARTIN MCNITT. } Ejectment.

This day come the parties, by their attorneys, and by consent this cause is set for hearing on the first Monday in July next.

Then, afterwards, to wit, on the thirteenth day of July, in the term and year last aforesaid, the following further proceedings were had in said court in said entitled cause and entered of record, to wit:

9 *Order of court.*

ASA TURNER
v.
MARTIN MCNITT. } Ejectment.

This day come again the parties, by their attorneys; and by agreement it is ordered that all formal exceptions to the depositions herein be waived, and that the depositions taken by either party may be used by both on the trial of this cause. On motion of defendant this cause is continued at his cost.

It is therefore ordered and adjudged that the plaintiff recover of the defendant the costs and charges by him about his suit at this term expended, and that he have execution therefor.

Now, afterwards, to wit, on the tenth day of January, at the January term of said court, in the year of our Lord one thousand eight hundred and seventy, the following further proceedings were had in said court in said cause and entered of record, to wit:

Order of court.

ASA TURNER
v.
MARTIN MCNITT.

10 This day come the parties, by their attorneys; and by agreement this cause is set for hearing on the twentieth day of January inst.

Afterwards, to wit. on the twelfth day of said January, in the term and year last aforesaid, the following further proceedings were had in said court in said entitled cause and entered of record, to wit:

Order of court.

ASA TURNER
v.
MARTIN MCNITT. } In ejectment.

This day comes the plaintiff, by Messrs. Skinner and Marsh, his attorneys; and on their motion this cause is set for hearing on Friday the 14th inst.

And afterwards, to wit, on the fifteenth day of said January, in the term and year last aforesaid, the following further proceedings were had in said court in said entitled cause and entered of record, to wit:

11 *Order of court.*

ASA TURNER
v.
MARTIN MCNITT. } In ejectment.

This day comes as well the plaintiff, by Messrs. Skinner and Marsh, his attorneys, as the defendant, by Messrs. Bushnell and Grimshaw, his attorneys; and, issue being joined, whereupon comes a jury of good and lawful men, to wit, W. T. Echert, Richard Young, Thomas York, Henry Le Claire, John P. Saye, Peter Crossman, John Cunningham, N. A. Garland, George P. Strickland, J. R. Herndon, John Edgar, and R. H. Beach, duly elected, tried, and sworn to try said issue; and, after a partial hearing, the further trial of this cause is postponed until Monday morning, the 17th inst.

Then, afterwards, to wit, on the seventeenth day of said January, in the term and year last aforesaid, the following further proceedings were had in said court in said entitled cause and entered of record, to wit:

12 *Order of court.*

ASA TURNER
v.
MARTIN MCNITT. } In ejectment.

Now come again as well the parties, by their attorneys, as the jury

impanelled herein. Upon further hearing of the evidence and argument of counsel, without concluding the same, the further trial is postponed until to-morrow morning.

Now, afterwards, to wit, on the eighteenth day of said January, in the term and year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

Order of court.

ASA TURNER
v.
MARTIN MCNITT. } In ejectment.

This day come again the parties, by their attorneys, as also the jury herein impanelled; and, after argument of counsel and instructions of the court, the jury returned the following verdict: "We, the jury,
13 find the issue for the plaintiff, and that the defendant is guilty of unlawfully withholding from the plaintiff possession of the premises in his declaration described, and to which the plaintiff is entitled in fee simple." Whereupon the defendant enters his motion for a new trial at common law; which said motion is continued for hearing at the next June term of this court.

Afterwards, to wit, on the seventh day of June, at the June term of said court of the year last aforesaid, the following further proceedings were had in said court in said entitled cause and entered of record, to wit:

Order of court.

ASA TURNER
v.
MARTIN MCNITT. } In ejectment.

This day come the parties, by their attorneys; and by agreement this cause is set for hearing on Tuesday, the 21st day of June inst.

And afterwards, to wit, on the twenty-third day of said June
14 in the term and year last aforesaid, the following further proceedings were had in said court in said entitled cause and entered of record, to wit:

Judgment.

ASA TURNER
v.
MARTIN MCNITT. } In ejectment.

On this day come again the parties, by their attorneys; and the court, having heard argument of counsel on the motion to set aside the verdict of the jury and for a new trial herein, entered by the defendant on the 18th day of January, A. D. 1870, and being sufficiently advised in the premises, overrules the said motion. It is therefore ordered and adjudged by the court that the plaintiff have and receive of and from said defendant the possession of the real estate and premises in the

plaintiff's declaration described, to wit, the southeast quarter of section four, in township one south, of range four west, situate in the county of Brown, and State of Illinois, and that he have a writ of possession therefor, not to be issued before the close of the present
15 term of this court. And it is also ordered and adjudged that the plaintiff recover the sum of one cent, his damages, in form aforesaid assessed by the jury, together with the sum of one hundred and five dollars and eighty cents, his costs and charges by him about his suit in this behalf expended, and that he have execution therefor.

Then, afterwards, to wit, on the twenty-fifth day of said June, in the term and year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

Order of court.

ASA TURNER
v.
MARTIN MCNITT. } In ejectment.

On motion of the defendant in the above cause, by J. Grimshaw, esq., his attorney, it is ordered that the costs herein be retaxed.

(End of case as against McNitt as sole defendant.)

16 Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, before the Hon. David Davis, presiding judge, and the Hon. Samuel H. Treat, district judge of said district, on Saturday, the first day of July, at the June term of said court, in the year of our Lord one thousand eight hundred and seventy-one, and of our independence the ninety-fifth year.

J. A. JONES, *Clerk.*

ASA TURNER
v.
RODOLPHUS F. TAINTER. } In ejectment.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Asa Turner, a citizen of the State of Missouri, plaintiff, puts in his place Messrs. Skinner and Marsh, his attorneys, against Rodolphus F. Tainter, a citizen and resident of the said southern district of Illinois, defendant in a plea of trespass and ejectment.

17 SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that, heretofore, to wit, on the third day of July, in the June term of said court, in the year of our Lord one thousand eight hundred and sixty-eight, in open court, came said plaintiff, by his attorneys, and filed in the clerk's office of said court his declaration in ejectment against the defendant, together with a notice in writing, thereto attached, and also an affidavit of a due service of a true copy of said declaration and notice upon the defendant; and also, at the same time, filed his bond for costs in said entitled cause; which said declaration, notice, affidavit, and bond for costs are in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA,
Southern District of the State of Illinois, ss:

United States circuit court, southern district of Illinois, June term, 1868.

Asa Turner, who is a citizen of the State of Missouri, by Skinner & Marsh, his attorneys, complains of Rodolphus F. Tainter, who is a
18 citizen of said southern district of Illinois, in a plea of trespass and ejectment, for that whereas, heretofore, to wit, on the first day of June, in the year eighteen hundred and sixty-eight, (A. D. 1868,) at and within the county of Brown and said State of Illinois, the said plaintiff was possessed, as of his own demesne, in fee-simple, of that certain tract or parcel of land, with the appurtenances, situate in the county of Brown, in the said State of Illinois, and described as follows, to wit: The southeast quarter of section four, (4,) in township one (1) south, of range four (4) west, in said Brown County, which said premises exceed in value the sum of five hundred dollars, and which the said plaintiff claims in fee-simple; and the said plaintiff being so possessed thereof, the said defendant afterwards, to wit, on the same day and year last aforesaid, entered into said premises and ejected the said plaintiff therefrom, and from the time last aforesaid has unlawfully withheld, and does now unlawfully withhold, from the said plaintiff the possession thereof, to the damage of said plaintiff of the sum of five
19 hundred dollars; therefore he brings this suit, etc.

SKINNER & MARSH,
Att'y' for Plaintiff.

(Indorsed:) Filed July 3, 1868. J. A. Jones, clerk.

Notice.

To Rodolphus F. Tainter, the above-named defendant:

You are hereby notified that the declaration, with a copy of which you are now herewith served, and to which this notice is attached, will be filed in the circuit court of the United States for the southern district of Illinois on the third day of July, 1868, of the June term of said court, A. D. 1868, and that, upon filing the same, a rule will be entered requiring you to appear and plead to the said declaration within twenty days after the entry of said rule, and that, if you neglect so to appear and plead, a judgment by default will be entered against you, and the plaintiff will recover possession of the premises specified in said declaration.

20 Dated this 30th day of June, A. D. 1868.

SKINNER & MARSH,
Att'y' for Plaintiff.

(Indorsed:) Filed July 3, 1868. J. A. Jones, clerk.

Affidavit.

STATE OF ILLINOIS, *Adams County, ss:*

Charles O. Wilcox, being duly sworn, says that on the first day of July, 1868, he served a declaration, of which the within is a copy, together with a notice thereto subjoined, of which the within is also a

copy, upon Rodolphus F. Tainter, the defendant named therein, by delivering the same to him personally.

CHA'S O. WILCOX.

Subscribed & sworn to before me this 2d day of July, 1868.

Witness my hand & seal notarial at the city of Quincy, in said county.
[L. S.] WALTER SCOGGAN,
Notary Public.

(Indorsed:) Filed July 3, 1868. J. A. Jones, clerk.

21 *Bond for costs.*

I do hereby enter myself security for costs in the within-mentioned cause, & acknowledge myself bound to pay, or cause to be paid, all costs which may accrue in said cause, either to the opposite party or to any officer of the court, in pursuance of law.
Dated June 30, 1868.

OTIS A. TURNER.

(Indorsed:) Filed July 3, 1868. J. A. Jones, clerk.

Whereupon, on the same day of the month, in the term and year aforesaid, the following proceedings were had in said court in said entitled cause and entered of record, to wit:

Order to docket.

ASA TURNER
v.
RODOLPHUS F. TAINTER. } In ejectment.

Now comes the plaintiff, by Messrs. Skinner and Marsh, his attorneys, and files his declaration in ejectment against the defendant, together with a notice in writing, thereto attached, and also an affidavit
22 of a due service of a true copy of said declaration and notice upon the defendant; and, upon reading and filing the same, it is ordered by the court, on motion of the plaintiff, that the cause be docketed and the defendant be ruled to plead thereto within twenty days, or that his default be entered; and, on like motion, it is further ordered that this cause be continued.

Afterwards, to wit, on the fifteenth day of July, of the year aforesaid, came said defendant, by E. H. Buckley, esq., his attorney, and filed in said clerk's office his plea herein; which said plea is in the words and figures following, to wit:

Plea.

In the United States circuit court of the southern district of Illinois, of the June term, 1868.

ASA TURNER
vs.
RODOLPHUS F. TAINTER. } In ejectment.

And now comes the said defendant, Rodolphus F. Tainter, and says

that he is not guilty of unlawfully withholding the premises claimed
23 by the plaintiff, as in his declaration herein alleged; and of this he puts himself upon the country.

E. H. BUCKLEY,
Att'y for Def't.

The defendant hereby reserves the right hereafter to disclaim title to the said premises or any part thereof.

E. H. BUCKLEY,
Att'y for Def't.

(Indorsed:) Filed July 15, 1868. J. A. Jones, cl'k.

And afterwards, to wit, on the eleventh day of June, at the June term of said court, in the year of our Lord one thousand eight hundred and sixty-nine, the following further proceedings were had in said court in said entitled cause and entered of record, to wit:

Order of court.

ASA TURNER
v.
RODOLPHUS F. TAINTER. } Ejectment.

This day come the parties, by their attorneys; and by consent this cause is set for hearing on the first Monday in July next.

24 Then, afterwards, to wit, on the thirteenth day of July, in the term and year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

Order of court.

ASA TURNER
v.
RODOLPHUS F. TAINTER. } In ejectment.

This day come again the parties, by their attorneys; and by agreement it is ordered that all formal exceptions to the depositions herein be waived, and that the depositions taken by either party may be used by both on the trial of this cause. On motion of defendant this cause is continued at his cost.

It is therefore ordered and adjudged that the plaintiff recover of the defendant the costs and charges by him about his suit at this term expended, and that he have execution therefor.

Now, afterwards, to wit, on the tenth day of January, at the January term of said court, in the year of our Lord one thousand eight
25 hundred and seventy, the following further proceedings were had in said court in said entitled cause and entered of record, to wit:

Order of court.

ASA TURNER
v.
RODOLPHUS F. TAINTER. } In ejectment.

This day come the parties, by their attorneys; and by consent this cause is set for hearing on the twentieth day of January inst.

Afterwards, to wit, on the twenty-second day of said January, in the term and year last aforesaid, the following further proceedings were had in said court in said entitled cause and entered of record, to wit:

Order of court.

ASA TURNER
v.
RODOLPHUS F. TAINTER. } In ejectment.

This day comes as well the plaintiff, by Messrs. Skinner and Marsh, his attorneys, as the defendant, by N. Bushnell, esq., his attorney; and, issue being joined, the same, by consent, is tried by the court
26 without the intervention of a jury. And the court, having heard the proofs and allegations of the parties, finds the issue for the plaintiff, and that the defendant is guilty of unlawfully withholding from the plaintiff possession of the premises in his declaration described, and to which the plaintiff is entitled in fee-simple. Whereupon the defendant enters his motion for a new trial at common law; which said motion is continued for hearing at the next June term of this court.

And afterwards, to wit, on the seventh day of June, at the June term of said court of the year last aforesaid, the following further proceedings were had in said court in said entitled cause and entered of record, to wit:

Order of court.

ASA TURNER
v.
MARTIN MCNITT. } In ejectment.

This day come the parties, by their attorneys; and by agreement
27 this cause is set for hearing on Tuesday, the 21st day of June inst.

Then, afterwards, to wit, on the twenty-third day of said June, in the term and year last aforesaid, the following further proceedings were had in said court in said entitled cause and entered of record, to wit:

Judgment.

ASA TURNER
v.
RODOLPHUS F. TAINTER. } In ejectment.

On this day come again the parties, by their attorneys; and the court,

having heard argument of counsel on the motion to set aside the verdict of the jury, and for a new trial herein, entered by the defendant on the 22nd day of January, A. D. 1870, and being sufficiently advised in the premises, overrules the said motion. It is therefore ordered and adjudged by the court that the plaintiff have and recover of and from said defendant the possession of the real estate and premises in the plaintiff's declaration described, to wit, the southeast quarter of
28 section four, in township one south, of range four west, situate in the county of Brown and State of Illinois; and that he have a writ of possession therefor, not to be issued before the close of the present term of this court; and it is also ordered and adjudged that the plaintiff recover the sum of one cent, his damages, in form assessed by the jury, together with the sum of thirty-four dollars and twenty-five cents, his costs and charges by him about his suit in this behalf expended, and that he have execution therefor.

Now, afterwards, to wit, on the twenty-fifth day of said June, in the term and year last aforesaid, the following further proceedings were had in said court in said entitled cause and entered of record, to wit:

Order of court.

ASA TURNER
v.
RODOLPHUS F. TAINTER. } In ejectment.

29 On motion of the defendant in the above cause, by J. Grimshaw, esq., his attorney, it is ordered that the costs herein be retaxed.

(End of case as against Tainter as sole defendant.)

Then afterwards, to wit, on the seventh day of July, in the term and year last aforesaid, the following further proceedings were had in said court in the foregoing entitled cause and entered of record, to wit:

Order for new trial and consolidation.

ASA TURNER
v.
MARTIN MCNITT. } In ejectment.

ASA TURNER
v.
RODOLPHUS F. TAINTER. } In ejectment.

This day come the defendants in the above-entitled causes, by J. Grimshaw, esq., their attorney, and enter their motion to set aside the verdicts and judgments rendered in these causes on the twenty-third day of June, A. D. 1870, and for a new trial under the statute.
30 And it appearing to the court that all the costs taxed in said causes have been paid by the defendants, it is therefore ordered that said verdicts and judgments be vacated and set aside, and a new trial awarded. And it is further ordered that these causes be consolidated and continued.

Afterwards, to wit, on the twenty-first day of June, in the June term

of said court, in the year of our Lord one thousand eight hundred and seventy-one, the following further proceedings were had in said court in said cause as consolidated and entered of record, to wit:

Order of court.

ASA TURNER
v.
MARTIN MCNITT ET AL. } In ejectment.

This day come the parties, by their attorneys, and by consent this cause is set for hearing on Monday, the 27th day of June inst.

And afterwards, to wit, on the first day of July, in the term and year last aforesaid, the following further proceedings were
31 had in said court in said cause as consolidated and entered of record, to wit:

2nd judgment.

ASA TURNER
v.
MARTIN MCNITT AND RODOLPHUS F. TAINTER. } In ejectment.

This day comes as well the plaintiff, by Messrs. Skinner and Marsh, his attorneys, as the defendants, by J. Grimshaw, esq., their attorney. And it appearing to the court that the following stipulation had been filed in this cause, to wit:

ASA TURNER
vs.
MARTIN MCNITT.

ASA TURNER
vs.
RODOLPHUS F. TAINTER.

It is agreed that, after said cases are reinstated and new trials taken, they may be consolidated, joint or several judgments to be taken if plaintiff ultimately succeeds, as plaintiff may desire.

O. C. SKINNER, *for Pl'ff.*
JACKSON GRIMSHAW, *P. D.*

And thereupon comes a jury of good and lawful men, to wit: Zachariah Maxcy, Asahel Coe, William S. Hurst, Warfield Staley, Isaac Pilcher, William E. Magill, Henry Seibert, William C. Griffith,
32 Adam A. Goodrich, Patrick O'Connor, Louis C. Bidamon, and John Bushet, duly elected, tried, and sworn to try said issue; and, having heard the evidence and argument of counsel, and received the instructions of the court, for verdict say:

"We, the jury, find the issue for the plaintiff, and that the defendants are guilty of unlawfully withholding from the plaintiff the possession of the real estate and premises in his declaration described, to wit: The southeast quarter of section four, (4,) in township one (1) south, of range four (4) west, in the county of Brown and State of Illinois, and to which the plaintiff is entitled in fee-simple."

It is therefore ordered and adjudged by the court that the plaintiff

recover possession of said premises, according to the force and effect of said recovery, and that a writ of possession issue therefor. It is also ordered that the plaintiff recover of the said defendants, jointly and severally, the sum of one cent damages, together with the sum of thirty-one dollars and sixty-five cents, his costs and charges by
33 him about his suit in this behalf expended, and that execution issue therefor.

Whereupon the defendants tender their bill of exceptions, which is signed, sealed, and ordered to be made part of the record in this cause.

Then afterwards, to wit, on the said first day of July of the year last aforesaid, came again said defendants, by J. Grimshaw, esq., their attorney, and filed in the clerk's office of said court their bill of exceptions herein; which said bill of exceptions is in the words and figures following, to wit:

Bill of exceptions.

Of the January term of 1871 of the circuit court of the United States for the southern district of Illinois.

ASA TURNER
vs.
MARTIN MCNITT. } Ejectment.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

34 Be it remembered that, upon the trial of this cause, the plaintiff offered and read in evidence—

1st. A patent from the United States to Louis F. Lefay, dated Oct. 23rd, 1818, and in due form, for the land in controversy.

2nd. A deed from said Louis F. Lefay to Samuel Spotts, dated December 19th, 1818, recorded in the proper county, March 22, 1820, for the same land.

3rd. A record of a decree of sale by order of the Adams circuit court, Illinois, at the September term thereof, A. D. 1838, on the application of Archibald Williams, administrator of Samuel Spotts, deceased, for the sale of the real estate described in the declaration in this case; which record is in the words and figures following, to wit:

Decree of sale.

STATE OF ILLINOIS,
County of Adams, sct:

Pleas before the Honorable James H. Ralston, at a circuit court began and holden at the court-house in Quincy, on Monday, the tenth day of September, in the year of our Lord one thousand eight hundred and thirty-eight, and continued and holden on Friday, the four-
35 teenth day of September, in the year aforesaid, within and for the said county of Adams and State of Illinois. Present, the Honorable James H. Ralston, judge of the fifth judicial circuit of the State of Illinois; C. M. Woods, clerk; William H. Tandy, sheriff.

ARCHIBALD WILLIAMS, ADMINISTRATOR OF the estate of Samuel Spotts, deceased. } On petition for sale of lands.

This day comes the said administrator, by Williams and Johnson,

his solicitors; and on his motion that this cause be placed upon the docket at the present term of this court; and thereupon the said petitioner, by his said solicitor, files his said petition, in the words and figures following, to wit:

In the circuit court of Adams County, and State of Illinois, now in chancery sitting. September term, A. D. 1838.

To the honorable judges of the said court:

Archibald Williams, administrator of the estate of Samuel Spotts, deceased, respectfully represents that the said Samuel Spotts, heretofore, to wit, before the first day of January, A. D. 1836, died in-
36 testate, leaving in this State the real property described in the copy of the inventory marked Exhibit "A," and filed herewith, and personal property to the value of five dollars; that, in the court of probate for the said county of Adams, and State of Illinois, your orator qualified as administrator of the said Spotts on the twenty-fourth day of November, in the year eighteen hundred and thirty-seven, as appears by the letters of administration, herewith filed, and marked Exhibit B, and that certain claims upon the estate of the said Spotts, amounting in all to the sum of , have been presented to the said court of probate, and by the said court allowed, as appears from an abstract of debts and credits obtained from the said court, and herewith filed, marked Exhibit "C;" all of which said exhibits, marked A, B & C, and herewith filed, are prayed to be taken as parts of this petition.

And your orator further represents that he knows of no property, real or personal, nor any assets of any kind whatever *kind* belonging to said estate out of which the said claims can be paid, other
37 than the said real estate in the said Exhibit A described and the credits in the said abstract, marked Exhibit C. Wherefore your orator prays this court that, on a hearing of this cause, it will be pleased to order a sale of the said property, or so much thereof as may be necessary for the payment of said debts in said Exhibit C mentioned, and of such other debts as may be hereafter proved or allowed in the said court of probate, in such manner, at such time and place, and on such terms as to this court shall seem fit.

And your orator, as in duty bound, will ever pray, &c.

ARCHIBALD WILLIAMS,
Adm'r of Samuel Spotts, dec'd.

WILLIAMS & JOHNSON,
For Plaintiffs.

And therewith the said petitioner, by his said solicitors, filed his Exhibit A, in the words and figures following, to wit:

An inventory of the real estate belonging to the estate of Samuel Spotts, deceased.

N. E. 24	7 S	3 W.	S. E. 11	6 N	2 W.	S. W. 24	15 N	7 E.
S. E. 27	2 S	6 W.	S. W. 11	6 N	2 W.	S. E. 24	15 N	7 E.
S. E. 23	3 S	7 W.	S. E. 1	6 N	2 W.	S. E. 4	1 S	4 W.
S. E. 27	1 N	7 W.	N. E. 10	8 N	3 E.	S. W. 24	3 N	8 W.
S. E. 34	2 N	6 W.	N. W. 34	9 N	8 E.	S. W. 15	10 N	3 E.
S. E. 10	8 N	3 E.	S. W. 14	13 N	2 W.	S. E. 26	13 S	2 W.
S. E. 3	3 N	5 W.	S. E. 14	13 N	2 W.	N. W. 36	4 N	6 W.
S. W. 3	3 N	5 W.	N. E. 23	13 N	3 W.	N. W. 23	5 N	7 W.
N. E. 29	4 N	2 W.	S. W. 22	13 N	3 E.	S. W. 7	9 N	5 E
N. W. 21	4 N	3 E.	S. E. 13	13 N	5 W.			
S. E. 20	5 N	1 W.	N. E. 35	15 N	4 W.			

(Written on margin:) Francis C. Moore, Joseph B. Gilpin.

38 I certify that the foregoing is a true copy of the inventory of real estate belonging to the estate of Samuel Spotts, dec'd, filed in my office by A. Williams, administrator of said Spotts, &c.

In testimony whereof I have hereunto affixed the seal of my office this 5th day of September, A. D. 1838.

[L. S.]

A. MILLER,
Probate Justice of the Peace
for Adams County, State of Illinois.

And therewith the said petitioner, by his said solicitors, filed his Exhibit B, in the words and figures following, to wit:

EXHIBIT "B."

STATE OF ILLINOIS,
County of Adams, sct:

The people of the State of Illinois to all to whom these presents shall come, greeting:

Know ye that, whereas Samuel Spotts, of the city of New Orleans and State of Louisiana, died intestate, as it is said, on or before the 1st day of Jauuary, A. D. 1836, having at the time of his decease personal property in this State, which may be lost, destroyed, or diminished in value if speedy care be not taken of the same, to the end, therefore, that said property may be collected and preserved for those who
39 shall appear to have a legal right or interest therein, we do hereby appoint Archibald Williams, of the county of Adams and State of Illinois, administrator of all and singular the goods and chattels, rights and credits, which were of the said Samuel Spotts at the time of his decease, with full power and authority to secure and collect the said property and debts wheresoever the same may be found in this State, and in general to do and perform all other acts which now are or hereafter may be required of him by law.

Witness Andrew Miller, probate justice of the peace in and for the said county of Adams, at his office in Quincy, this 24th day November, A. D. 1837.

A. MILLER,
P. J. R. Adams County, Illinois.

And therewith the said petitioner, by his said solicitors, filed his Exhibit C, in words and figures following, to wit:

Abstract of debts and credits filed in the probate court respecting Samuel Spotts's estate.

40 1837.	Dr.		1838.	Cr.	
Dec'r 7	To notes of Samuel Spotts, filed P. J. R. office for the use of John Nicholson.....	$7,283 11	April 3	By amount of inventory of personal estate, filed this day, cash on hand.....	$5 00
April 13	J. M. Kennedy, acc't.....	240 00		By balance against the estate.	19,599 91
	To note D. N. Hennen.....	900			
	To do., filed for use do., & interest and cost	1,237 50			
	To do., Paul Tulane, cost, &c.	1,219 68			
	To do., use James Predern & Bros.....	1,019 68			
	To do., Frederick Beekman, cost & interest	1,265 50			
	To do., same do	1,881 37			
	To do., same do.....	2,725 57			
	To do., Andrew Hodge, jun'r.	1,407 16			
May 21	To Paul Tulane & Co. & acc't.	405 12			
		$19,604 91			
	To balance against the estate.	19,599 91			

In testimony whereof I, Andrew Miller, probate justice of the peace in and for the county of Adams and State of Illinois, do certify the above and foregoing to be a true abstract from the records in my office, at Quincy. Whereof I have affixed the seal of office this 19th day of July, A. D. 1838.

[L. S.] A. MILLER, *P. J. R.*

41 And afterwards, to wit, on this fourteenth day of September, in the year of our Lord one thousand eight hundred and thirty-eight, the said petitioner, by his said solicitor, filed his notice and certificate of publication, in the words and figures following, to wit:

NOTICE.—The subscriber, as administrator of the estate of Samuel Spotts, deceased, will make application to the circuit court of Adams County and State of Illinois, at the next September term thereof, for leave to sell the following real estate, belonging to the said Samuel Spotts, or so much thereof as will be sufficient to pay his debts, his personal estate being insufficient to pay the same. All persons interested in said estate are requested to show cause, if any they have, why it should not be sold for the purposes aforesaid.

Parts of sections.	Township.	Range.	Parts of sections.	Township.	Range.
N. E. 24	7 S.	3 W.	S. W. 14	13 N	2 W.
S. E. 27	2 S.	6 W.	S. E. 14	13 N	2 W.
S. E. 22	3 S.	7 W.	N. E 23	13 N	3 W.
S. E. 27	1 N	7 W.	S. W. 22	13 N	3 E.
S. E. 34	2 N	6 W.	S. E. 13	13 N	5 W.
S. E. 10	8 N	3 E.	N. E. 35	15 N	4 W.
S. E. 3	3 N	5 W.	S. W. 24	15 N	7 E.
S. W. 3	3 N	5 W.	S. E. 24	15 N	7 E.
42 N. E. 29	4 N	2 W.	S. E. 4	1 S.	4 W.
N. W. 21	4 N	3 E.	S. W. 24	3 N	8 W.
S. E. 20	5 N	1 W.	S. W. 15	10 N	3 E.
S. E. 11	6 N	2 W.	S. E. 26	13 S.	2 W.
S. W. 11	6 N	2 W.	N. W. 36	4 N	6 W.
S. E. 1	6 N	2 W.	N. W. 23	5 N	7 W.
N. E. 10	8 N	3 E.	S. W. 7	9 N	5 E.
N. W. 34	9 N	8 E.			

All of the above land being recorded north or south of the base line, and east and west of the fourth principal meridian.

ARCHIBALD WILLIAMS,
Administrator of Sam'l Spotts, dec'd.

JULY 21.

43 We certify that the above advertisement has been published four weeks in the "Quincy Whig," (a paper of which we are the printers.) First publication on the 21st of July, 1838, and last on the 11th of Aug., same year.

BARTLETT & SULLIVAN.

Printers' fees, $6.00.

And now, on this fourteenth day of September, in the year of our Lord one thousand eight hundred and thirty-eight, a decree is made by the said court as follows, to wit:

ARCHIBALD WILLIAMS, ADMINISTRATOR OF Samuel Spotts, deceased. } Petition to sell lands.

In the circuit court of Adams County and State of Illinois, September term, 1838.

This day this cause came on to be heard on the bill and exhibits

therein filed, and O. H. Browning was appointed guardian ad litem for the infant heirs of Samuel Spotts, deceased; whereupon, it appearing to the court that the allegations in the said bill contained are true, and that due publication of notice has been made of the intention
44 to apply to this court for permission to sell the lands in the said bill mentioned, this court doth therefore order, adjudge, and decree that the said Williams, as administrator of the said Spotts, shall have power and authority to sell all of the said lands, or so much thereof as may be necessary to pay the debts of the said Spotts, in the manner and upon the terms following, to wit: Whensoever the said administrator shall desire to sell all or any part of the lands aforesaid he shall give previous notice of the time and place of such sale, for the space of six weeks, successively, by putting up notices thereof in at least four of the most public places in the county where such real estate shall be sold, and also by causing a similar notice thereof to be published in the nearest newspaper in this State. He shall make the said sale at public vendue, between the hours of ten o'clock in the forenoon and five o'clock in the afternoon of the day so advertised; he shall make the said sale on a credit of not less than six nor more than twelve months, by
45 taking bond, with good security, for the payment of the purchase-money, and by taking, also, a mortgage of the said land. And the said administrator shall, from time to time, report his proceedings herein to the court of probate of Adams County, and shall account to the said court for the proceeds of such sale or sales as assets of his intestate.

J. H. RALSTON,
Circuit Judge.

4th. A deed, in due form of law, from Archibald Williams, administrator of Samuel Spotts, deceased, in pursuance of the foregoing decree, to Duncan N. Hennen, dated 17th June, 1839, for the same land, and recorded in the proper county April 3d, 1841.

5th. Depositions proving that said Hennen died intestate January, 1867, and that he left, as his only heirs-at-law, Anna & Lydia Hennan.

Deposition of A. Miltenberger.

Deposition of Aristide Miltenberger, witness for plaintiff, taken November 18th, 1868, at New Orleans, La., before G. W. Christy, notary public.

46 My name is Aristide Miltenberger; my age, fifty-seven years; my occupation, a merchant; and I reside in the city of New Orleans, in the State of Louisiana. I well knew Duncan N. Hennen in his life-time. Said Duncan N. Hennen intermarried with Eleonora Robertson on or about the year 1836. This was the first and only marriage of the said Duncan N. Hennen, and the first and only marriage of said Eleonora Robertson. Said Duncan N. Hennen died in said New Orleans, on the 4th day of June, A. D. 1867, and the said Eleonora Hennen, his wife, is still living in New Orleans. The said Duncan N. Hennen and the said Eleonora, his wife, had born to them, in lawful wedlock, two children only: 1st, Anna Hennen; 2nd, Lydia Hennen; that the said Lydia Hennen is yet a single woman and was never married; that the said Anna Hennen did remain a single woman until the 30th day of April, A. D. 1868, on which day she was married to Gen'l J. B. Hood,
47 and now remains his wife; that said Lydia Hennen is 28 years of age and the said Anna is 31 years of age.

AR. MILTENBERGER.

6th. Power of attorney, date 6th of March, 1868, from said Anna & Lydia Hennen, heirs at law of Duncan N. Hennen, to Benjamin Lombard, jr., in due form, empowering him in their names to convey the land in controversy.

7th. Deed from said Anna & Lydia Hennen, by said Benjamin Lombard, jr., attorney in fact of said heirs of Hennen, of date 31 March, 1868, to Otis A. Turner, for said land in controversy, in due form of law.

8th. Deed from said Otis A. Turner to Asa Turner, plaintiff, of date 31 March, 1868, for same land, in due form of law.

9th. Deposition of Jacob R. Long.

48 *Deposition of Jacob R. Long.*

Deposition of Jacob R. Long, witness for plaintiff, taken at Mt. Sterling, Illinois, before A. K. Lowry, N. P.

Int. 1. What is your name, age, place of residence, and occupation?

Ans. Jacob R. Long; age, 42 years last January; Brown County, Illinois; farmer.

Int. 2. Do you know the parties to this suit; and if so, how long have you known them respectively?

Ans. Yes, sir; I have seen Mr. Turner and I know McNitt; have known Mr. Turner about two years; have known Mr. McNitt fifteen or twenty years.

Int. 3. State, if you please, on what quarter section of land you reside, and how long you have resided thereon.

Ans. I reside on the southeast quarter of section thirty-two, township one north, range four west; have resided thereon about thirty-four years.

Int. 4. Are you or are you not acquainted with the locality and improvements on the southeast quarter of section four, in town-
49 ship one south, range four west, in Brown County, Illinois; and, if so, how long have you known said quarter section, and how far do you reside therefrom, and what are the improvements thereon, if any?

Ans. Yes, sir; I am acquainted with the land and the improvements thereon; have known it for about thirty-four years. I reside about one mile and a half from it. The land is inclosed by fences surrounding adjoining lands; some of it in cultivation.

Int. 5. State whether or not you was acquainted with said southeast quarter of section four, township one south, range four west, from the year 1840 to 1850.

Ans. Yes, sir; I was acquainted with it during all of that period.

Int. 6. State, if you please, whether or not said southeast quarter of section four aforesaid was vacant and unoccupied during the period from 1840 to 1850, or in the possession and occupancy of some one.

Ans. It was vacant and unoccupied during the whole period from 1840 to 1850. It was not possessed or occupied by any one during that time.

50 Int. 7. State, if you know, at what date the first improvement was made on said land.

Ans. It must have been about 1853 or 1854; not earlier than that date.

JACOB R. LONG.

10th. Deposition of Angus McPhail.

Deposition of Angus McPhail.

Deposition of Angus McPhail, witness for plaintiff, taken at Mt. Sterling, Ills., June 29th, 1869, before A. K. Lowrey, N. P.

Int 1st. What is your name, age, residence, and occupation?

Ans. Angus McPhail; 57 years; Brown County, Illinois; 4 miles west of Mt. Sterling; farmer.

Int. 2. Do you know the parties to this suit; and, if so, how long have you known them respectively?

Ans. I know Martin McNitt. Do not know Asa Turner. Have known McNitt about 24 years.

51 Int. 3. State, if you please, whether or no you are acquainted with the locality of the southeast quarter of section four, in township one south of the base line, range four west, in Brown County, Illinois; and, if so, how long have you known it, and how far do you reside from it?

Ans. I am acquainted with the locality of said land; have known it for the last twenty-five years. I reside one mile and a half from said land.

Int. 4. State, if you know, whether or no said southeast quarter of section four, above described, was vacant and unoccupied between the years 1840 and 1850; or was it occupied or in possession of any person during that period?

Ans. To the best of my knowledge, it was vacant and unoccupied between the years 1840 and 1850. No person occupied it during that time.

Int. 5. State, if you please, at what date the first improvements were made on said land.

Ans. To the best of my knowledge, the first improvement was made on said land in the year 1857.

52 Int. 6. State, if you please, how long you have resided within one mile and a half of said southeast quarter of section four aforesaid.

Ans. About twenty years.

Int. 8. [No. 7th int.] State, if you please, whether you was or was not frequently on said quarter section of land between the years of 1840 and 1850.

Ans. Yes, sir; I was. I owned my present home since 1844, and have frequently herded cattle on said southeast quarter of section four aforesaid between 1840 and 1850.

ANGUS McPHAIL.

11th. Deposition of A. A. Glenn.

Deposition of A. A. Glenn.

Deposition of A. A. Glenn, witness for plaintiff, taken June 30, 1869, at Mt. Sterling, Illinois, before A. K. Lowry, N. P.

Int. 1. What is your name, age, place of residence, and occupation?

Ans. Archibald A. Glenn; age, 50 years; residence, Mt. Sterling Brown County, Illinois; occupation, banker.

53 Int. 2. Do you know the parties to this suit; and, if so, how long have you known them respectively?

Ans. I am not acquainted with the plaintiff. I am acquainted with defendant, and have known him for about nine years.

Int. 3. State, if you please, whether or no you are acquainted with the locality of the southeast quarter of section four, township one south, range four west, in Brown County, Illinois; and, if so, how long have you known said land?

Ans. I am acquainted with said land, and have known it since about the year 1853 or 1854.

Int. 4. State, if you please, whether or no you ever owned and possessed said land; and, if yea, when did you own and possess it, and from whom did you purchase it?

Ans. In the year 1857, I purchased said land from Mess. Moore & Sherman, agents of Duncan N. Hennon, of New Orleans, and received from said agents a contract for the purchase therefor, and took possession of said land under said contract immediately after the date of the contract.

54 Int. 5. State, if you please, how long you were in possession of said land, and what improvement, if any, you made thereon, and to whom you surrendered the possession thereof.

Ans. I think I was in possession of said land five or six months, perhaps longer. I had several acres of said land broken and sowed in wheat, and I think I retained possession until after harvest. I about that time rescinded the contract with Mess. Moore & Sherman for said land, and surrendered the possession to them as agents aforesaid.

ARCHIBALD A. GLENN.

(Indorsed:) Filed & opened at request of pl'ff's att'y's July 6th, 1869. J. A. Jones, cl'k.

12th. Depositions of S. C. Sherman and F. H. Moore.

Deposition of Seth C. Sherman.

Deposition of Seth C. Sherman, witness for plaintiff, taken May 13th, 1869, at Quincy, Illinois, before John H. Williams, U. S. com'r.

My name is Seth C. Sherman; age, sixty years; residence,
55 Quincy, Illinois, & have resided there for more than thirty years last past. Am at present engaged in no business, but from 1835 to 1865 I was engaged in the business of land agent, during all of which time I was a member of either the firm of Moore, Morton & Co. or Moore & Sherman; that is to say, I was a member of the firm of Moore, Morton & Co. until its dissolution, &, after that, of the firm of Moore & Sherman, who continued the same business.

Int. 1st. What connection had you with the list of lands called the Samuel Spotts list, or the Duncan N. Hennen list, in regard to the payment of taxes thereon for said Hennen; or had you a firm, & by what name was the firm called?

Ans. I was a member of the firm of Moore, Morton & Co., land agents. Said firm paid the taxes on said list of lands for many years with money furnished by Hennen.

Int. 2. Who paid the taxes on the southeast quarter of section four, (4,) in township one south, & range four (4) west, of the fourth
56 (4th) principal meridian, in Brown County, Illinois, for the years 1840 to 1848, both inclusive, and for the years 1850 to 1858, both inclusive, and with whose money and for whom?

Ans. The firm of Moore, Morton & Co. paid the taxes on said land for each of said years for Duncan N. Hennen & with his money.

Int. 3rd. What connection had John Nicholson with said land in reference to the payment of taxes, or with said Hennen in 1846 & 1847; & if his name was used in the payment of taxes on said land for said Hennen, how did that arise?

Ans. Nicholson corresponded with Moore, Morton & Co. about the payment of taxes for those years, claiming to act for Hennen and in his stead. He was acting for the Hennen title. The tax-receipts for those years appear to have been taken in the name of J. Nicholson.

Int. 4. If the receipt for the taxes of 1845 was taken in any other name than Hennen's, in whose name was it so taken & why?

Ans. The receipt for taxes of 1845 was taken in the name of the heirs of S. Spotts by error, the lands having been originally entered on
57 the books of Moore, Morton & Co. in the name of the heirs of S. Spotts, or Samuel Spotts.

Int. 5. In what tract or region was the Samuel Spotts, or Duncan N. Hennen, list of lands located?

Ans. The list of lands that I have known as the Duncan N. Hennen list of lands is located in what is known as the military bounty tract in the State of Illinois. I understand these lands to be the same as mentioned in the record of an administrator's sale, made by Archibald Williams as administrator of the estate of Samuel Spotts, deceased. I know of no other list called the Samuel Spotts, or Duncan N. Henderson, list of lands.

SETH C. SHERMAN.

(Indorsed:) Filed & opened, per request of Messrs. Skinner & Marsh, May 29, 1869. J. A. Jones, cl'k.

58 *Deposition of Francis C. Moore.*

Deposition of Francis C. Moore, witness for plaintiff, taken May 13th, 1869, at Quincy, Illinois, before John H. Williams, U. S. com'r.

Int. 1st. How long have you been engaged in the land agency business in Quincy, Illinois?

Ans. Thirty-five years.

Int. 2. If you ever acted as agent for Samuel Spotts in relation to any list of lands claimed by said Spotts, state in what tract or region said lands lay, & state if said lands were ever disposed of at administration sale, by what administrator; and if said lands are mentioned in any record before you or transcript of record, please refer to the same, and mark it with your signature.

Ans. I cannot say whether I have done business directly with Samuel Spotts or not. The lands were sold by Archibald Williams, administrator's sale, at the court-house in Quincy. I refer to a transcript of the record of said sale, upon the margin of which I have written my
59 name, containing a list of said lands. Said lands lay in what is known as the military bounty tract in the State of Illinois.

Int. 3. Is the southeast quarter of section four, in township one south, & range four west of the fourth principal meridian, in Brown County, Illinois, one of the Samuel Spotts list?

Ans. It is on said list as certified by me.

Int. 4. If you ever acted as agent for Duncan N. Hennen, in relation to said lands after said sale, please state about how long & what connection, as agent or otherwise, if any, John Nicholson had with said lands, or said Hennen's affairs connected therewith.

Ans. I acted as Duncan N. Hennen's agent for such of said lands as

he bought at the administrator's sale for a considerable time; cannot state how many years; my impression is that Hennen went to the West Indies, and that said Nicholson acted as his agent during his absence, we doing the business with said Nicholson the same as with said
60 Hennen. I mean, when I say that I acted as agent, that it was our firm which, for a portion of the time, was Moore, Morton & Co.

Int. 5th. Did the firm of Moore, Morton & Co. ever sell the S. E. ¼ of sec. 4, township one (1) south, range 4 west, to any person on behalf of said Hennen? If yea, when & to whom was such sale made, and what was the result of it? Please state all you know about it.

Ans. On the 15th March, 1851, we sold to Ja's W. Singleton said land, subject to confirmation of Hennen, which sale was not confirmed, & was canceled Dec. 8th, 1861. On the 5th day of August, 1857, we sold said land for said Hennen to Archibald A. Glenn, who at that time paid $100.00, part of the purchase-money. On the 9th day of February, 1859, the sale was canceled by our repaying to Glenn $50.00 of the $100.00 he had paid, and his agreeing to make no charge for taxes that had been paid or for improvements he had made.

FRANCIS C. MOORE.

(Indorsed:) Filed May 29, 1869, & opened per request of Messrs. Skinner & Marsh. J. A. Jones, cl'k.

61 *Transcript referred to in the deposition of F. C. Moore.*—J. H. WILLIAMS, *U. S. Com'r.*

STATE OF ILLINOIS, *Adams County, sct:*

At a term of the county court for the county of Adams and State of Illinois, began and held at the court-house in the city of Quincy, on Monday, the fourth day of August, A. D. 1851, in pursuance of law, before the Honorable Philo A. Goodwin, sole county judge.

MONDAY, *August 4th*, 1851.

Court met. Present, the Honorable Philo A. Goodwin, county judge; J. C. Bernard, clerk; Washington Wren, sheriff.

SATURDAY, *August 30th*, 1851.

Court met. Present, the same as on yesterday.

Report of administrator.

To the honorable the probate court for the county of Adams and State of Illinois:

The report of Archibald Williams, administrator of the estate of Samuel Spotts, deceased, respectfully showeth:

That, at the September term of the Adams County circuit court, in said State of Illinois, A. D. 1838, a decree was pronounced by said court (in chancery sitting) in the matter of a certain petition therein filed by said Williams for the sale of real estate, whereby the said
62 Williams, as administrator as aforesaid, was authorized and empowered, upon certain terms and in a certain manner therein prescribed to sell certain real estate belonging to the estate of said intestate, and was required to report his proceedings therein to this court, as will more fully appear upon reference to said decree, remaining of record in said circuit court; that afterwards, to wit, on the seventeenth

day of June, in the year eighteen hundred and thirty-nine, the said Williams, as administrator as aforesaid, having given due notice of the same, as directed in and by the terms of said decree, did proceed to sell at public auction, between the hours of five o'clock a. m. and ten o'clock p. m., the real estate in the said decree and in the other proceedings of said suit mentioned, and belonging to the estate of said Samuel Spotts, deceased; that he sold said real estate to the highest bidder for the respective tracts of land, upon a credit of six months for one-half the purchase-money and twelve months for the remainder, and required of the purchasers thereof, respectively, bonds with security for
63 the money and mortgages on the land, as in and by the said decree was directed. And said Williams further reports that the said lands were sold at said sale to the several purchasers respectively, and for the several sums of money in the following statement set forth, to wit:

Account of sales of land by Archibald Williams, administrator of Samuel Spotts, deceased, 17 June, 1839.

Section.	Town.	Range.	Purchaser.	Price per acre.	Amount.	Gross total.	No.
N. E. 24	7 S.	3 W.	Duncan N. Hennen	2 00	320 00		1
S. E. 27	2 S.	6 W.	"	1 75	280 00		2
S. E. 4	1 S.	4 W.	"	1 50	240 00		3
S. E. 26	13 S.	2 W.	"	1 00	160 00		4
S. E. 27	1 N.	7 W.	"	2 87½	460 00		5
S. E. 10	8 N.	3 E.	"	1 75	280 00		6
N. E. 29	4 N.	2 W.	"	1 25	200 00		7
S. E. 20	5 N.	1 W.	"	1 25	200 00		8
S. E. 11	6 N.	2 W.	"	3 37½	540 00		9
S. E. 1	6 N.	2 W.	"	2 00	320 00		10
N. E. 10	8 N.	3 E.	"	1 25	200 00		11
S. E. 14	13 N.	2 W.	"	1 75	280 00		12
N. E. 23	13 N.	3 W.	"	2 25	360 00		13
S. W. 24	15 N.	7 E.	"	1 00	160 00		14
S. E. 24	15 N.	7 E.	"	1 06¼	170 00		15
64 S. W. 15	10 N.	3 E.	"	2 87½	460 00		16
N. W. 23	5 N.	7 W.	"	1 25	200 00		17
N. W. 21	4 N.	3 E.	"	1 25	200 00		18
S. W. 11	6 N.	2 W.	"	3 37½	540 00		19
S. W. 14	13 N.	2 W.	"	1 56¼	250 00		20
S. E. 13	13 N.	5 W.	"	1 40	224 00		21
N. E. 35	15 N.	4 W.	"	1 68¾	270 00		22
S. W. 24	3 N.	8 W.	"	1 56¼	250 00		23
N. W. 36	4 N.	6 W.	"	1 31¼	210 00		24
S. E. 22	3 S.	7 W.	H. W. Miller	6 50	140 00		25
S. E. 34	2 N.	6 W.	Elam Frost	3 12½	500 00		26
N. W. 34	9 N.	3 E.	Charles Ballance	5 06¼	810 00		27
S. W. 22	13 N.	3 E.	John B. Brown	2 31¼	370 00		28
S. W. 7	9 N.	5 E.	Charles Ballance	1 31¼	210 00		29
S. E. 3	3 N.	5 W.	Jonathan Browning	3 43¾	550 00		30
S. W. 3	3 N.	5 W.	"	3 50	560 00		31
Gross total of sales						$10,814 00	

Notes on hand belonging to the estate of Samuel Spotts, deceased, 20th May, 1840.

	$ c.		Date.	When due.
One note,	510 00,	C. Ballance,	17 June, 1839,	12 months.
One note,	520 00,	H. W. & D. A. Miller,	" "	12 months.
One note,	185 00,	John B. Brown,	17 June, 1839,	12 months.
One note,	150 00,	Elam Frost,	17 June, 1839,	12 months.
Balance	$1,365 00			

ARCHIBALD WILLIAMS,
Adm'r, &c.

65 In the matter of the estate of Samuel Spotts, deceased, intestate.

It appearing to the satisfaction of the court that the report of Archibald Williams, administrator of the estate of Samuel Spotts, deceased, found with the papers of said estate in the office of the clerk of the court, was not filed or approved by the probate justice at the time said report was made out by said administrator, it is therefore ordered that said report be filed, approved, and duly recorded.

P. A. GOODWIN,
County Judge.

STATE OF ILLINOIS, *Adams County, sct:*

I, Charles H. Morton, clerk of the county court of said county and State, do hereby certify that the above transcript is a true, correct, and complete copy of the report of Archibald Williams, administrator of the estate of Samuel Spotts, deceased, and of the order of the court thereon, as the same appears by the files and records now in my office.

[5-ct. int. rev. stamp, canceled.]

In testimony whereof I have hereunto set my hand and affixed
66 the seal of said court, this 28th day of November, 1868.
[L. S.] CHARLES H. MORTON, *Clerk.*

13th. James W. Singleton's deposition.

Deposition of James W. Singleton.

Deposition of James W. Singleton, witness for plaintiff, taken at Quincy, Illinois, May 13th, 1869, before John H. Williams, U. S. com'r.

My name is James W. Singleton; residence, Adams County, Illinois; am over fifty years of age. About the year A. D. 1861, I sold to Martin McNitt my farm, consisting of the southwest quarter of section four, & southeast quarter of section five, in township one south, range four west, which adjoin the southeast quarter of section four, (4,) township one (1) south, range four (4) west, in Brown County, Illinois. I, at that time, had a right possession of said quarter section under Moore, Morton & Co., as agents for Duncan N. Hennen, & I made a quit-claim deed for the same, stating to him at the time that I had no title, but merely a right to possession under said Moore, Morton & Co., for Duncan
67 N. Hennen. McNitt took possession of the same under my deed to him.

JA'S W. SINGLETON.

(Indorsed:) Filed & opened, per request of Messrs. Skinner & Marsh, May 29, 1869. J. A. Jones, cl'k..

14. Deposition of William Lee.

(Deposition of William Lee, not of file in my office.—J. A. JONES, *clerk.*)

15. Stipulation.

Stipulation.

ASA TURNER
vs.
MARTIN MCNITT.

ASA TURNER
vs.
RODOLPHUS F. TAINTER.

Circuit court United States, s. district, Illinois.

It is agreed that, after said cases are reinstated and new trials taken, they may be consolidated, joint or several judgments to be taken, if plaintiff ultimately succeeds, as plaintiff may desire.

O. C. SKINNER, *for Pl'ff.*
JACKSON GRIMSHAW, *P. D.*

(Indorsed:) Filed June 24th, 1870. J. A. Jones, cl'k.

68 DEFENSE.

1st. A deed of Samuel Spotts to John Lucas, dated 12th September, 1820; recorded January 2, 1864.

Deed.

This indenture, made the twelfth day of September, in the year of our Lord one thousand eight hundred and twenty, between Samuel Spotts, of the State of Kentucky, party of the first part, and John Lucas, of the same place, party of the second part, witnesseth, that the said party of the first part, for and in consideration of two hundred dollars, lawful money of the United States, to him in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, remised, released, conveyed, and confirmed, and by these presents doth grant, bargain, sell, remise, release, alien, convey, and confirm, unto the said party of the second part, his heirs and assigns forever, all the following-described tracts, pieces, or parcels of
69 land situated, lying, and being in the tract set apart for military bounties in the State (late Territory) of Illinois: The northeast quarter of section twenty-three, of township thirteen north, in range three west, and the southeast quarter of section four, of township one south, in range four west, containing in all three hundred and twenty acres: to have and to hold the above-described land, with the appurtenances thereof, unto the said party of the second part, and to his heirs and assigns forever. And the said party of the first part, for himself and his heirs, the above-described land, and hereby bargained and released premises, and every part thereof, with the appurtenances, unto the said party of the second part, his heirs and assigns, against the said party of the first part, his heirs and assigns, and against all and every person or persons whomsoever, lawfully claiming or to claim the same, shall and will warrant and by these presents forever defend.

In testimony whereof the said party of the first part hath here-
70 unto set hand and seal the day and year first above written.

SAMUEL SPOTTS. [SEAL.]

Signed, sealed, and delivered in the presence of—
JNO. H. TODD,
I. SHANNON.

STATE OF KENTUCKY, *County of Franklin, to wit:*

Be it remembered that, before me, the subscriber, a justice of the peace within and for said county, personally appeared Sam'l Spotts, the party grantor to the within indenture, and who is to me personally known to be the same person described as such therein, and acknowledged the same to be his free act and deed, for the uses and purposes therein specified.

Given under my hand and seal this twelfth day of September, A. D. 1820.

JNO. H. TODD, *J. P. F. C.* [SEAL.]

FRANKLIN COUNTY, *sct:*

I, Willis A. Lee, clerk of the county court for the county aforesaid, do certify that the within deed was produced to me in my office, on
71 the twelfth day of September, 1820, by Samuel Spotts, the party grantor thereto, and acknowledged by him to be his act & deed, for the uses and purposes therein mentioned.

In testimony whereof I hereunto set my hand as clerk the day and year above written.

WILLIS A. LEE, *Clerk.*

STATE OF ILLINOIS, *Brown County, ss:*

I, Martin Brooks, clerk of the circuit court and ex officio recorder within and for said county, in the State aforesaid, do hereby certify that the above and foregoing is a true and correct copy of a deed from Samuel Spotts to John Lucas, as appears of record in my said office, in book "S," page 737.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Mt. Sterling, this 12th day of July, A. D. 1869.

[L. S.] MARTIN BROOKS, *Clerk,*
By GEO. B. ALLEN, *Deputy.*

72 STATE OF KENTUCKY, *ss:*

I, Alexander H. Rennick, clerk of the county court for the county of Franklin, in the State aforesaid, do certify that, on the twelfth day of September, one thousand eight hundred and twenty, it appears from the records of said Franklin County court, in the State of Kentucky, that Willis A. Lee was the clerk thereof, duly elected & qualified as such, and that full faith and credit was due to all his official acts as such.

In testimony whereof I have hereto set my name as clerk and affixed the seal of said court, at Frankfort, this ninth day of December, 1869.

[L. S.] A. H. RENNICK,
Clerk Franklin County Court, Ky.

2. A deed of John Lucas to James Lucas, dated May 5th, 1841, in due form, and properly certified and recorded January 22, 1864.

4. James Lucas to Booth Nettleton. Deed in due form, and dated October 23rd, 1863, and recorded January 22, 1864.

73 5. Deed of Booth Nettleton to Martin McNitt, dated 23 May, 1864; recorded Sept. 23, 1864, in due form.

6. Power of attorney in due form, dated 26 March, 1864, from Harry Spotts, Jane P. Spotts, his wife, James H. Spotts, and Elizabeth H. Spotts, his wife, and Mary E. Triplett, heirs at law of Samuel Spotts,

deceased, to Henry K. Nash, authorizing the sale and conveyance of the land in controversy by said Nash to any person.

7. A deed in due form from the parties who made said power of attorney, by said Nash, then attorney of the land in controversy, dated July 27, 1863, recorded May 20, 1864, to Benjamin F. Arnold.

8. A deed in due form from Benjamin F. Arnold to Martin McNitt, defendant, dated Sept. 10th, 1863.

9. Said Arnold to Martin McNitt; deed in due form; date, May 27th, 1864; recorded Sept. 23, 1864.

10. Archibald A. Glenn, whose deposition has been heretofore copied, testified, on being called upon the stand as a witness by the defence, that when he rescinded his contract for said land with
74 Moore and Sherman he made such recession at their office in Quincy, Illinois, more than thirty miles from the land in controversy in this suit; that he did not, as a matter of fact, personally deliver possession of the premises in controversy to them, or either of them, or parties for whom they were acting as agents; that, after he canceled his contract, he merely abandoned the land, and Martin McNitt took possession of it, and has since improved it.

This was all the evidence offered in the case by either party.

The court thereupon charged the jury, at the instance of said plaintiff, that plaintiff had shown title in fee to said premises, and was entitled to recover the same; to which opinion and decision of the court the defendant then and there excepted at the time of the said charge. The defendant asked the court to charge the jury that said deed from Samuel Spotts to John Lucas, numbered in the foregoing for the de-
75 fence 1st, dated the 12th day of September, 1820, and duly acknowledged and recorded in Brown County, Illinois, 22nd January, 1864, conveyed the title in fee, by mesne conveyances, to the defendant in this case, which charge the court refused to give; to which refusal of the court so to charge the jury the defendant then an' there, at the time of refusal, excepted. And the said defendant then and there asked the court—upon the introduction and reading as evidence of the 103 section of the 109 statute of the revised code of Illinois of the year 1845, which reads as follows, to wit: "When any executor or administrator whose testator or intestate shall have died seized of any real estate in this State shall discover that the personal estate of such testator or intestate is insufficient to pay the just claims against his or her estate, such executor or administrator shall, as soon as conveniently may be, make a just and true account of the said personal estate and debts, as far as he or she can discover the same, and shall make out a petition to the circuit court of the county in which administration
76 shall have been granted, stating therein what real estate the said testator or intestate died seized of, or so much thereof as shall be necessary to pay his or her debts as aforesaid, and request the aid of the said court in the premises; and it shall also be the duty of such administration or executor to give at least thirty days' notice of the time and place of presenting such petition, by serving a written notice of the same, together with a copy of said account and petition, on each of the heirs or their guardians, or devisees of said testator or intestate, or by publishing a notice in the nearest newspaper for three weeks successively, commencing at least six weeks before the presenting of said petition, of the intention of presenting the same to the circuit court for the sale of the whole or so much of the real estate of the said testator or intestate as will be sufficient to pay his or her debts, and requesting

all persons interested in said real estate to show cause why it should not be sold for the purposes aforesaid"—to charge the jury that
77 the said intestate, Samuel Spotts, having, on the 12th of September, 1820, conveyed the premises in controversy to John Lucas, did not die seized thereof, and that the said land was not subject to sale for the payment of said Spotts's debts under the terms and provisions of said statute, which charge the court refused to give; to which opinion and decision of the court in refusing to give said charge, the defendant then and there excepted. Defendant also asked the court to charge the jury that title in fee to the premises in controversy passed from Samuel Spotts to John Lucas, by virtue of the deed set forth in the record, dated 12th of September, 1820, and by mesne conveyances by John Lucas to defendant, and that, said Spotts having conveyed the land in controversy prior to the time of the proceedings set forth in the record on the application of Archibald Williams, administrator of said Samuel Spotts, for the sale of said real estate, no title passed to said Williams, grantee, through said application, said decree
78 of sale, or deed, to Duncan N. Hennen, which charge the court refused to give; to which opinion and decision of the court in refusing to give said charge, the defendant then and there excepted.

To preserve which all matters and things, the said defendant now presents to the said court this his bill of exceptions, and asks the court to sign and seal the same, and to make the same a part of the record; which is accordingly done at the trial of said cause.

S. H. TREAT. [SEAL.]

(Indorsed:) Filed July 1st, 1871. J. A. Jones, cl'k.

Then afterwards, to wit, on the sixth day of July, of the year last aforesaid, came again said defendants and filed in said clerk's office their bond herein; which said bond is in the words and figures following, to wit:

79 *Bond.*

Supreme Court of the United States.

ASA TURNER
v.
MARTIN MCNITT AND RODOLPHUS F. TAINTER. } In ejectment.

Know all men by these presents that we, Martin McNitt and Rodolphus F. Tainter as principals, and William Lee as surety, are held and firmly bound unto Asa Turner in the sum of five hundred dollars, to be paid to the said Asa Turner, his heirs, executors, or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this sixth day of July, A. D. 1871.

Whereas the above-named Martin McNitt and Rodolphus F. Tainter have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled
80 suit by the circuit court of the United States for the southern district of Illinois:

Now, therefore, the condition of this obligation is such, that if the above-named Martin McNitt and Rodolphus F. Tainter shall prosecute

their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

MARTIN McNITT. [SEAL.]
R. F. TAINTER. [SEAL.]
WILLIAM LEE. [SEAL.]

Sealed and delivered in presence of—
WILLIAM N. MUMFORD.

Approved.

S. H. TREAT,
Dist. Judge.

(Indorsed:) Filed July 6, A. D. 1871. J. A. Jones, cl'k.

81 [5-ct. int. rev. stamp, canceled.]

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

I, J. A. Jones, clerk of the circuit court of the United States in and for the southern district of Illinois, do hereby certify the foregoing eighty pages to contain a true and complete copy of all the papers filed and proceedings thereon had in a certain cause wherein Asa Turner is plaintiff and Martin McNitt and Rodolphus F. Tainter are defendants, as truly and completely as the same appear of file and record in my said office.

In witness whereof I have hereunto set my hand and seal of said court at Springfield, in said district, this twenty-seventh day of November, in the year of our Lord one thousand eight hundred and seventy-one, and of our independence the ninety-sixth year.

[SEAL.] J. A. JONES, *Clk.*

82 UNITED STATES OF AMERICA, *ss:*

To ASA TURNER, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Illinois, wherein Martin McNitt and Rodolphus F. Tainter are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness Samuel H. Treat, district judge of the United States for the southern district of Illinois and one of the judges of the circuit court of the United States for said district, this sixth day of July, in the year of our Lord one thousand eight hundred and seventy-one, and of our independence the ninety-sixth.

S. H. TREAT,
District Judge.

83 (Indorsed:) Circuit court United States, southern district of Illinois. Asa Turner v. Martin McNitt and Rodolphus F. Tainter. Citation.

I hereby appoint Jackson Grimshaw my special deputy to execute this writ. Oct. 24, 1871.

JOHN L. ROUTT,
U. S. Marshal So. Dist. Ill.

Executed this writ on the 24th day of Oct., 1871, by reading the same to Messrs. Skinner and Marsh, attorneys of the within-named Asa Turner.

JOHN L. ROUTT,
U. S. Marshal,
By JACKSON GRIMSHAW,
Special Deputy.

Service, $4.00; mileage, 114, $6.84—$10.84.

84 *Errors assigned, to be also stated in assignmemt for plaintiffs in error hereafter under rules of Supreme Court of the United States.*

1. Court erred in admitting the proceedings of Adams circuit court, Illinois, under application of Archibald Williams, administrator of Samuel Spotts, deceased, to sell the real estate in controversy, and in assuming that said sale, deed, & report was valid, when, in truth & in fact, said proceedings were void. There is no evidence of debts due by Spotts, upon which to sell said land, and the decree or order does not find any, but says Spotts owed

2. The charge of the court is erroneous, in this, that the jury was instructed, at the instance of plaintiff, "that plaintiff had shown
85 title in fee to said premises, and has entitled to recover the same," when, in fact, plaintiff had not shown title in fee to said premises.

3. The defendant asked the court to charge the jury that the deed offered in evidence from Samuel Spotts to John Lucas, and read, and of date 12 September, 1820, recorded 22 January, 1864, in Brown County, Illinois, where land is situated, conveyed the title in fee of land to defendant, which charge the court refused to give.

4 The court was asked by defendant to charge the jury that the said intestate, Samuel Spotts, having on the 12th September, 1828, conveyed the premises in controversy to John Lucas, did not die seized thereof, and that the said land was not subject to sale for payment of said Spotts' debts under the terms and provisions of the statute of the State
86 of Illinois, section 103, statute 109, revised code of 1845, set out in bill of exceptions, which charge the court refused to give.

5. The court was also asked to charge the jury that title in fee to premises in controversy passed from Samuel Spotts to John Lucas by virtue of the deed set forth in record dated 12th September, 1820, and by mesne conveyances to defendant; that Spotts having conveyed the land in controversy prior to the time of procedings set forth in record as the application of Archibald Williams, administrator of Samuel Spotts, for sale of said real estate, no title passed to Williams, grantee, under or through said application, sale, or deed, to Duncan N. Hennen.

The court having refused to charge the jury as asked by defend-
87 ant, specific exceptions were taken on the trial, at time of rulings, to the charge given for plaintiffs, and the refusal to charge as asked by defendant.

JACKSON GRIMSHAW,
Attorney for Plaintiff in Error.

(Indorsement on cover:) No. 479. Martin McNitt and Rodolphus F. Taintor, plaintiffs in error, v. Asa Turner. S. Illinois C. C. U. S. Filed 5th December, 1871.

SUPREME COURT OF THE UNITED STATES.

No. 238.

MARTIN McNITT & RODOLPHUS F. TAINTER, PLAINTIFFS IN ERROR,

vs.

ASA TURNER.

STIPULATION AND AGREEMENT OF COUNSEL.—FILED 14TH DECEMBER, 1872.

1 Supreme Court of the United States.

Error to circuit court of the southern district of Illinois.

MARTIN McNITT & RODOLPHUS F. TAINTER
vs.
ASA TURNER. } No. 479.

It is stipulated that it was proved in the court below that the land mentioned in the record herein and in question, was of the value of more than two thousand dollars, but which fact is omitted in said record, and such fact is to taken as a part of said record.

And that in the deposition of William Lee, read on the trial below and omitted in said record, he testified that after Glenn was in possession of the land in controversy in 1861, said McNitt took possession of it, and afterwards purchased the title proved on the part of plaintiff in error, as shown by said record, and from thence claimed the land under said title and made improvements thereon, and which is to be
2 taken the same as if inserted in and a part of said record.

And it is stipulated that this cause stand submitted under Rule No. 20 of said court upon briefs of the respective parties at the next term of the Supreme Court.

Dated November 25, 1872.

JACKSON GRIMSHAW,
Attorney for Plaintiff in Error.
SKINNER & MARSH,
Att'ys for Def't in Error.

SUPREME COURT of the UNITED STATES.

No. 479.

MARTIN McNITT AND RODOLPHUS F. TAINTER, *Plaintiffs in Error,*

vs. } *In Ejectment.*

ASA TURNER, *Defendant in Error.*

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR SOUTHERN DISTRICT OF ILLINOIS.

ARGUMENT FOR PLAINTIFFS IN ERROR.

SUPREME COURT of the UNITED STATES.

No. 479.

MARTIN McNITT AND RODOLPHUS F. TAINTER, *Plaintiffs in Error,*

vs. } *In Ejectment.*

ASA TURNER, *Defendant in Error.*

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR SOUTHERN DISTRICT OF ILLINOIS.

ARGUMENT FOR PLAINTIFFS IN ERROR.

The land in controversy is as specified by the defendant in error—the south-east quarter of section four in township one south, range four west, in Brown county, Illinois.

It will be found that the petition and decree in the case state no meridian. It will also be found by the court, if they examine the map of Illinois, that there is, in Washington county, or Clinton county, Illinois, a quarter section called the southeast quarter of section four, in township one south, range three west.

The land in Washington or Clinton county was arranged from the third principal meridian. The land in the military tract which purports to be in controversy in this case, must have been arranged from the fourth principal meridian.

The court will, of necessity, take notice that third meridian started from the mouth of the Ohio river, where it empties into the Mississippi river.

The court will also take notice that the fourth principal meridian started from the mouth of the Illinois river, but really at Beardstown, Cass county, Illinois.

The court will see by the examination of the "paper book," page two (2), that the suit in this case is for a tract of land in the county of Brown, State of Illinois, to-wit: the south-east quarter of section four in township one south, range four west, in said county of Brown.

The court will find, by examination of the acts of Congress and the maps that necessarily form a part of real estate controversies in the west, that Brown county, in which the land in the declaration in ejectment (see page two (2), "paper book,") was situated, was west of the fourth principal meridian, while the court will find from the laws and the maps, that there was a correlative section four in township one south, range three west, in the county of Washington, or Clinton, State of Illinois.

The court will find on page fifteen (15) of the "paper book," the inventory of the real estate of Samuel Spotts, through whom plaintiff in this case claims to derive title. The court will find in said inventory, on page fifteen (15) in said "paper book," "S. E. 4, 1 S. 4 W." They will find on page seventeen of "paper book," a description as follows, "S. E. 4, 1 S. W.," added to that as follows:

"All of the above land being recorded north or south of the base line, and east and west of the fourth principal meridian.

(Signed) ARCHIBALD WILLIAMS,
Administrator of Samuel Spotts, deceased."

A decree ("paper book," page (18) eighteen) follows this, authorizing the sale of the real estate described on page seventeen (17) in "paper book."

On page twenty-four (24) "paper book," is a report of sale to Duncan N. Hennen of the S. E. 4, 1 S. 4 W., for one dollar and fifty cents per acre.

Then follows a deed from Archibald Williams, administrator of Samuel Spotts, deceased, purporting to be in pursuance of

the decree in this case, to Duncan N. Hennen, dated June seventeenth, A. D. 1839, for the lands professed to be conveyed in pursuance of this decree.

I make no question about the heirs of Duncan N. Hennen; my point is that Spotts' title never passed out of him by virtue of the Archibald Williams sale.

In the first place, Archibald Williams never was a general administrator of Samuel Spotts. (See page 16, "paper book.")

It will be found by examination of the Revised Code of 1845 of Illinois, in force previous and for many years after the time of this sale, in section thirty-six, statute of Wills, that the power of said Williams as administrator of Spotts was under section thirty-six (36) of said act, and, it will appear page sixteen (16) of "paper book," was thus:

"The form of letters to be granted to the person or persons so appointed to collect was as follows:

The people of the State of Illinois to all to whom these presents shall come, greeting:—Know ye, that whereas * * late of the county of * * and State of Illinois, deceased, as it is said, had at his decease personal property within this State, the administration whereof cannot immediately be granted to the persons by law entitled thereto, but which, if speedy care be not taken, may be lost, destroyed, or diminished, to the end, therefore, that the same may be preserved for those who shall appear to have a legal right or interest therein, we do hereby request and authorize Archibald Williams, (see "paper book," page 16) of the county of * * and State aforesaid, to collect and secure the said property, wheresoever the same may be in this State, whether it be goods, chattels, debts, or credits, and to make or cause to be made a perfect inventory thereof, and to exhibit the same with all convenient speed to the Court of Probate of said county of * * together with a reasonable account of his collections, acts, and doings in the premises aforesaid. * * * "

Revised Code of Illinois, 1845, page 544.

"The bond of such administrator has the following condition: That he * * shall make or cause to be made a true and perfect inventory of all such goods, chattels, debts, and credits of

the said deceased as shall come to his * possession or knowledge, and the same in due time return to the office of the Probate Justice of the proper county, and shall also deliver to the person or persons authorized by said Court of Probate, as executors or administrators to receive the same, all such goods, chattels, and personal estate as shall come to his * possession as aforesaid, and shall in general perform such other duties as shall be required of him by law."

On page 544, Revised Code of Illinois, 1845, section 38, will be found the oath of such collecting administrator: " * * * I will well and honestly discharge the trust reposed in me as collector or administrator to collect the estate of * * deceased, according to the tenor and effect of the letters granted me by the Court of Probate of the said county of * * * to the best of my knowledge and ability. * * "

Section 39, page 544, Code of 1845, says thus:

"Every collector so appointed * * shall have power to collect the goods, chattels, and debts of the deceased and to secure the same at such necessary and reasonable expense as shall be allowed by the Court of Probate. * * * The court may authorize him to sell * * such as may be perishable and be injured by delay, and to account for the same. And for the whole trouble incurred by such collector, the Court of Probate may allow such commission on the amount of the said personal estate as shall be actually collected and delivered to the proper executor or administrator aforesaid, as said court may deem just and reasonable." * * * *

Page 545, Revised Code of 1845, section 41, provides, "when letters testamentary or of administration shall be granted, that the power of the collector shall cease, and, on demand, he shall turn over the property or money of the deceased which shall have come into his possession." * * * *

Now, if the court will look at the "paper book," page 16, your Honors will see that the letters issued to Mr. Williams, as the administrator of Samuel Spotts, of New Orleans, Louisiana, were in conformity with the Illinois law above quoted, and simply to collect goods and chattels, debts and credits, and not to meddle with land. The court will find on pages 17 and 18, that

said Williams, traveling out of his authority to take charge of the goods and chattels, debts and credits of said Spotts, asked, as per page 18, to sell his lands. He had no more authority to ask to sell them, than I have.

The sale was not erroneous, it was void. The administrator was the controller of personal property, he had no right to meddle with the real estate. The order of the Circuit Judge (see page 18) is not merely erroneous, it is absolutely void. The filing of the certificate of realty, on pages 15, 16, 17, could not under any circumstances create the power in the administrator to ask for, or the court to grant, the power to sell the realty.

I press this question from the fact that, along with other estates in Illinois, the abstract on page 16, "paper book," shows that this whole thing was a fraud; and, while I wish to acquit my former partner and very dear friend from any participation in it, he must have been, for a man who afterwards became a very able and distinguished lawyer, sadly deficient in his knowledge of the powers conferred upon him by his letters of the twenty-fourth of November, 1837.

If the court will look at page 16, at the schedule of debts, they will find no proof against this collecting administrator of the existence of any debt against the estate. The court will find on the credit side of the account, as of the date of April 3, 1838, by amount of inventory filed this date, "Cash on hand, five dollars ($5.00)." Spotts lived in New Orleans, Louisiana. Was it probable that he had five dollars in Illinois to be inventoried by a collector? Now, will the court, on page 16, look at the debit account utterly unproved, showing a balance, after deducting the mythical five dollars, of nineteen thousand five hundred and ninety-nine dollars and ninety-one cents ($19,599.91).

It will appear from the letters on page 16, that Samuel Spotts died about the first of January, 1836. It will appear from the inventory on page 16, that, on what is pretended to be the debit side of the account, Samuel Spotts is charged for the use of John Nicholson with seven thousand two hundred and eighty-two dollars and eleven cents ($7282.11); that on the 13th of April, 1837, he is charged with items amounting to nineteen thousand six hundred and four dollars and ninety-one cents ($19,604.91).

He was dead then. Strange to say that this man, living along side of these people in New Orleans who claim these debts and did not prove them, seems to have owned thirty-one (31) quarter sections of land somewhere in Illinois. He dies, as shown on page 16, about the first of January, 1836. He dies in New Orleans, Louisiana, intestate.

On the twenty-fourth day of November, 1837, letters to collect are taken out in Adams county, Illinois. The pretended debts against his estate, as per page 16, "paper book," range from December 7th, 1837, to May 21st, some year, time not stated. The fabulous credit of five dollars, as of date April 3d, 1838, is given apparently with a view to create jurisdiction, and thirty-one quarter sections of land are sold by an administrator appointed solely to collect, for what purports to be ten thousand eight hundred and fourteen dollars.

This act of 1845, which has been quoted from the Revised Code of that year, is the same law that existed at the time of the order of sale of these lands, and continued, like previous laws, this same marked distinction between an administrator to collect and an administrator or executor with full powers as such. The collector had power over personal property, to be by him, when collected, turned over to the general administrator or executor, if any such existed. The said code of 1845, page 555, section 89, provides that executors and administrators (meaning general executors and administrators) shall inventory, in addition to the moneys, judgments, bonds, and other chattels, "also all his titles to estates, both real and personal, as well equitable as legal, specifying the kind, quantity, quality, situation, and value of such real estate, by what title held, and from whom purchased, if known; the debts appearing to be due or to become due to such testator or intestate, the names of the persons by whom owing, date of the contracts and amounts of interest accruing on the same, with such other and further description of said estate, the books, papers, and evidences of title, so as to make the same as full and perfect as possible, which said inventory, when made, shall be filed in the office of the Probate Justice, as is required in other cases by this chapter."

Section 92, statute of Wills, Revised Code of 1845, provides

on page 556: "Executors and administrators shall be chargeable with so much of the estate, whether real, personal, or mixed, or the proceeds thereof, of their testator or intestate, as they, after due and proper diligence, shall recover or receive."

The same chapter, Revised Code of 1845, page 558, section 103, provides; "When any executor or administrator, whose testator or intestate shall have died seized of any real estate in this State, shall discover that the personal estate of such testator or intestate is insufficient to pay the just claims against his or her estate, such executor or administrator shall, as soon as conveniently may be, make a just and true account of the said personal estate and debts * * and shall make out a petition to the Circuit Court of the county in which administration shall have been granted, stating therein what real estate the said testator or intestate died seized of, * * and request the aid of the said court in the premises." The law further requires that such administrator or executor shall give at least thirty days' notice of the time and place of presenting such petition, by serving a written notice of the same, with a copy of said account and petition, on the heirs, guardians, or devisees of said testator or intestate, or by publishing a notice in the nearest newspaper for three weeks successively, commencing at least six weeks before presenting said petition of the intention of presenting the same to the Circuit Court, for the sale of * * real estate of the testator or intestate to pay debts. * *

Section 104, page 558, same statute, in substance requires the Circuit Court to examine the proofs of such executor or administrator, and upon a showing by proof that the personal estate is not sufficient to pay debts of the deceased, to order a sale of the realty for the purpose of paying debts.

Section 108, same chapter, same code, page 559, provides, that no part of the real estate of any testator or intestate shall be ordered to be sold, unless the executor or administrator applying for such order shall have filed an inventory, appraisement, bill, and sale bill, and shall have applied all the deceased's personal estate to the payment of his debts.

Not a single one of these last stated provisions of the statute of Wills of Illinois applies to an administrator to collect, and

such only was Archibald Williams, who inaugurated and carried out the sale of the realty, if any was made in this case.

The administrator to collect had no power over the realty, took no oath to cover his administration of it, gave no bond to cover the proceeds of it, had no power to receive or reject proof of the debits or credits of the estate. His letters, page 16, "paper book," show simply power and authority to collect the personal property of Samuel Spotts, deceased. This is the basis of this whole proceeding. Jurisdiction to sell the realty of Samuel Spotts, as against persons interested, might have been acquired by the notice on page 17, if he had been a full administrator, and not simply a collector, as it appears from the record. Being a mere collector, and not administrator with power over the realty, his action in the matter was void and created no power over the subject matter.

There must be at least two ingredients of jurisdiction—person and subject matter. Grant, for argument's sake, that the notice on page 17, if given by a proper person, would bring parties into court, Williams had no power to give it and no control over the real estate to be sold. Here is jurisdiction of neither person nor property, and the judgment or decree of the Circuit Court of Adams county, Illinois, could not create or mend a jurisdiction that did not exist. All was *coram non judice* and void.

The argument of counsel for defendant in error proceeds upon the theory that Williams was an administrator in the general sense of the word. It will be seen that he was a collector of chattels, with no other power.

Counsel for defendant in error, on pages 2 and 3 of their argument, quote sections 103, 104, 105, 106, from same chapter of Revised Code of Illinois of 1845, that I have been quoting from. On examination, the court will find that all these sections apply to an administrator who has general powers, and not to an administrator to collect.

No outside party can enforce the lien of creditors against the realty of deceased, it must be done by the administrator or executor and not by the collector, and no order of the court can help such interference by an outside person.

The petition in the case, however, no matter by whom filed, shows no debts against Spotts, and if no debts, there was no lien; if no lien, no power of sale.

The petition says Spotts owed the sum of $19,604.91, and refers to schedule C, filed with petition. There is neither proof, certificate, nor finding, showing that Spotts owed anything. Nothing but the bald reference to a schedule C.

Schedule B is Williams' appointment as collector, which shows he had no power over realty.

The court (paper book, p. 18) only finds that allegations of bill are true. The material allegation of bill or petition is that Spotts owed $19,604.91.

The reference to schedule C does not aid petition, and decree finding allegations of petition true, cannot fill blanks nor prove unverified schedules.

The power to sell depends on the existence of debts, which, if they exist, create a *quasi* lien. In Grignon's Lessees vs. Astor there was a *quasi* finding of debts, but that case shows a full administration, where many presumptions in favor of the finding and order of the County Court at Green Bay might have been indulged in. Still the record in the case, as shown in the reports, reminds me of many records in my native State of Pennsylvania, which would not pass muster in the most unaccomplished counties in so new a State as Illinois. But it did show an assumption of jurisdiction, and persons and property seemed to be under the power of the court. The case of Bignardello vs. Gray does not help this case. Any doctrine of jurisdiction laid down in that case fails to sustain the right of a party unauthorized by law to get up a proceeding to sell the realty of another person.

The numerous cases cited by the counsel on the other side are decisions that the judgment of a court of competent jurisdiction, having also acquired jurisdiction over the party, cannot be attacked collaterally, I do not propose to discuss. My argument in this case is based upon the fact in connection with the law of Illinois, that Williams, the administrator to collect, had no power or control over Spotts' real estate, and having no such power, could not by his petition confer power over Spotts' real estate in the Circuit Court of Adams county, Illinois.

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The numerous cases cited by the counsel on the other side are decisions that the judgment of a court of competent jurisdiction, having also acquired jurisdiction over the party, cannot be attacked collaterally, I do not propose to discuss. My argument in this case is based upon the fact in connection with the law of Illinois, that Williams, the administrator to collect, had no power or control over Spotts' real estate, and having no such power, could not by his petition confer power over Spotts' real estate in the Circuit Court of Adams county, Illinois.

It will be seen by the court that the title to the land described in the declaration passed by patent from the United States to one Lefay; that Lefay by deed conveyed the premises to Samuel Spotts, December 19th, 1818, and that Samuel Spotts, on the 12th day of September, 1820, conveyed the land to John Lucas. Spotts afterwards died, but he did not die seized of this land. The deed from Spotts to Lucas will be found in paper book, page 26, and on pages 27 and 28 will be found the title traced into McNitt. The title to the land in September, 1838, was in John Lucas, and not in Spotts or his heirs.

Section 58, page 548, statute of Wills, code of 1845, uses the phrase: "Where any person shall die seized * * of any real estate."

Section 103, statute of Wills, Revised Code of 1845, reads thus; "When any executor or administrator, whose testator or intestate shall have died seized of any real estate in this State, shall discover that the personal estate of such testator or intestate is insufficient to pay the just claims against his or her estate, such executor or administrator shall, as soon as conveniently may be, make a just and true account of the said personal estate and debts * * and shall make out a petition to the Circuit Court of the county in which administration shall have been granted, stating therein what real estate the said testator or intestate died seized of, and request the aid of the court in the premises."

Seizin has no connection with the recording acts, in the sense of the statute of Wills; it means just what it did in England years ago and in this country from the time of its first settlement—title of some kind vested in the man who died, at the time of his death. The implied lien given to creditors of the dead man attaches, as it seems to me, only to land of which the dead man was seized of when he died, and not to land that he had conveyed prior to his death.

The section of the Illinois statute, quoted by the counsel on the other side, on page 5, was intended to protect creditors with patent liens and subsequent purchasers without notice. It is from the statute of Conveyances, in the code of 1845, page 108, and must be taken as applying to transfers by deed to purchas-

ers without notice, and to creditors with an apparent lien; it can certainly have no application to the secret lien of the creditors who, in 1837, got up large debts against Samuel Spotts, who died in 1836, and who had conveyed this land in September, 1820, to John Lucas, through whom McNitt, the defendant in possession, claims. If these debts, so called, had existed at the time Spotts conveyed this land to John Lucas, there might have been some foundation for the pretense that this secret lien for the debts of a dead man, who died at least sixteen years after the conveyance to John Lucas, followed the lands into the hands of Lucas's grantee. The whole pretense of right to recover in this case rests upon the idea of lien. How could a lien for debts, apparently created in 1837, against Spotts who died in 1836, (see paper book, pages 15, 16) attach by the Williams proceeding to the grantees of John Lucas, who acquired title September 12, 1820?

I refer the court to chapter 90, Revised Statutes, Revised Code of Illinois of 1845, page 472, section 23, which reads: "If the provisions of different chapters of the Revised Statutes conflict with or contravene each other, the provisions of each chapter shall prevail as to all matters and questions growing out of the subject matter of such chapter." The same chapter, page 465, repeals "An act supplemental to an act relative to wills and testaments, executors and administrators, and the settlement of estates, approved January 23, 1829—March 1, 1833," also, "An act supplemental to an act relative to wills and testaments, approved January 27, 1835," also, "An act supplementary to an act entitled an act relative to wills and testaments and the settlements of estates, approved February 25, 1833." On page 64, same chapter, will be found the repeal of "An act relative to wills and testaments, executors and administrators, and the settlements of estates, approved January 23, 1829," also, "An act to amend an act relative to wills and testaments, executors and administrators, and the settlement of estates, approved February 14, 1831." All these laws which are repealed, were virtually re-enacted in the Revised Code of 1845.

The provisions quoted by the counsel on the other side, on page 5 of their argument, are taken from chapter 24 of said Re-

vised Code of 1845; the provisions heretofore quoted with regard to decedent's executors and administrators are taken from chapter 109 of Revised Code of 1845. That chapter invariably uses the word "seized," and in no instance refers to the recording act or acts of the State of Illinois, and, if this court gives effect to the 90th chapter of Revised Code of 1845, the conveyance act, which precedes the chapter of wills and is upon a different subject, cannot be used to control the chapter on wills, which is subsequent to it. The subject matters that arise in this case, as to administration and sale by administrator, are clearly within the scope of the statute of wills, and have nothing to do with the statute of conveyances. The acts preceding the statute of wills in the code of 1845 used the words "died seized" without any reference to recording acts, except that the law of Indiana Territory, approved September 17, 1807, which uses this language with reference to the sale of realty for the payment of debts: "If any person * * shall die intestate, being owner of lands or tenements within this Territory at the time of their death." This law, like the others, contains no reference to recording acts. The recording act of Indiana Territory, section 8, requires deeds to be recorded within twelve months after their execution, and declares, if not so recorded, it shall be void against any subsequent purchaser or mortgagee for a valuable consideration. The statute of the State of Illinois, adopted, February 19, 1819, this same statute of Indiana Territory, changing only such words as were necessary to show that it was adopted by a "State." The statute of the State of Illinois of January 31, 1827, on the subject of recording, requires deeds to be recorded in twelve months after they were made, if not, provides that such unrecorded deed shall be void against any subsequent *bona fide* purchaser or mortgagee for valuable consideration. The statute of Illinois of January 22, 1829, requires deeds executed after June of that year to be recorded within six months, if not, declares them void as against subsequent purchasers or mortgagees for a valuable consideration.

It will be perceived that none of these laws make an unrecorded deed void as to creditors, but do avoid the unrecorded deed as against subsequent purchasers and mortgagees for valu-

able consideration. I have given, I think, a reference to the Territorial law of Indiana and the State laws of Illinois, down to and including the act of 1829. I do not find the word "creditor" used in any of them. These were the laws in force up to the time when Williams, as administrater of Spotts, asked to sell this land. Admitting for the sake of argument, that the parties named in schedule C in paper book, page 16, were creditors of Samuel Spotts, yet their cases did not fall within the provisions of any recording act of the State of Illinois, that I can find down to 1838, when the application was made to sell the real estate. The parties named in the schedule referred to were neither purchasers nor mortgagees for value, and as to them, the title in 1838 was in John Lucas, the grantee of Spotts, unless some one turned up who was a subsequent purchaser or mortgagee for value. Duncan N. Hennen, the purchaser at the administrator's sale, only stepped into the shoes of the creditors and was subrogated to their rights and acquired nothing more. We find throughout the case neither subsequent purchaser or mortgagee for value. My impression is that the word "creditor" was first used in the chapter entitled Conveyances, Revised Code of 1845, and that no such word can be found in any of the recording acts prior to the filing of the Williams petition.

On page 7 in the argument of counsel on the opposite side will be found an attempt to show that defendant in error was entitled to recover, aside from paramount title derived from the United States. I think I have shown in my argument, that defendant in error had no paramount title derived from the United States. How can Turner, defendant in error, with whom McNitt, plaintiff in error, never had any connection, and who (Turner) is out of possession, while McNitt is in, recover, without strength to his title, as original plaintiff below, even if McNitt's title were weak? McNitt never held under Turner, he never attorned to Turner, he held in his own right, and in defiance of Turner and everybody else; he is not Hennen or one of the heirs of Hennen. The heirs of Hennen seem to have given a power of attorney, on the 6th of March, 1868, to Benjamin Lombard, jr. Lombard, as their attorney in fact, on the 6th of March, 1868, conveys to Otis A. Turner, and he, on the

6th of March, 1868, to Asa Turner (paper book, page 19). This transaction may be all straight as between Lombard and the Turners, but the effort, on page 7 of the argument of counsel for defendant in error, seems to be to set up not merely a defense, but to claim paramount title as against McNitt, the occupant of the land, under the second section of the statute of Illinois of 1839, which uses this language: "Whenever a person having color of title, made in good faith, to vacant and unoccupied land, shall pay all taxes legally assessed thereon for seven successive years, he or she shall be deemed and adjudged to be the legal owner of said vacant and unoccupied land."

McNitt, according to Singleton's testimony (paper book, page 25), got into possession in 1861. No attempt was made to dispossess him until the commencement of this suit by Turner to the June term, 1868, of the United States Circuit Court for the Southern District of Illinois. The declaration having been served on the 1st of July, 1868, McNitt must have from the dates actually occupied the lands adversely to every one for seven years prior to the commencement of this suit, and the purchase of Turner, the plaintiff in this case, could not be in good faith, when applied to this second section of the act of 1839. Turner bought at his peril, bound by notice of McNitt's claim by his possession. The Supreme Court of Illinois has decided that all the world is chargeable with notice of the claim of title of the occupant of real estate.

Williams vs. Brown *et als.*, 14 Illinois, 201.

In that case the court says: "The purchaser of real estate is bound to inform himself as to what interest the party in possession claims, and it makes no difference whether he originally entered as a tenant or otherwise; his possession is constructive notice of his rights in the premises, unless he fails to state them when inquired of."

I do not think any case decided by the Supreme Court of Illinois has ever gone to the extent of holding that a person having color of title and having paid taxes for seven years on vacant land, could use it as adverse paramount title against an occupant holding adversely to such claim of title, under the second section of the act of 1839. On the contrary, the Supreme Court of Illi-

nois decided in the case of Harding vs. Butts, 18 Illinois, page 502, that the second section of the act of 1839, above referred to, was unconstitutional and void.

In 19 Illinois, page 380, Skinner, Justice, now of the firm of Skinner & Marsh, counsel in this case, decides, if his opinion delivered in that case can be understood, that this second section of the act of 1839 is a limitation law, and that it may be used as such. In Sterns vs. Giddings, 23 Illinois, page 387, the Supreme Court of Illinois decided that this same section is constitutional as a limitation law, and the constitutionality of the law is put upon no other ground. In the same case, 19 Illinois, page 376, the same court decides that the owner of the land may defeat the right of holder of claim of title: by payment of taxes at any time, by making entry and taking actual possession of the land at any time before claimant comes into possession thereof.

The case of Paullin vs. Hale, cited on page 7 of argument for defendant in error, does not settle the law as stated in argument of defendant's attorneys. It asserts this, "that this second section of the law of 1839 cannot be used ~~as a record,~~ unaccompanied by possession. Yet when the requirements of this section have once given the benefit of the bar under the statute, and possession under the bar has been acquired, a temporary abandonment by party claiming under the bar will not forfeit his right acquired by the bar. He may recover possession as against all persons to whom his bar, if set up in defense, would have been available. This is the effect of all limitation laws." In this case of Paullin vs. Hale, Paullin clearly jumped Hale's possession and deserved to be turned out. It is not like the present case.

Long's evidence shows that the land ceased to be vacant in 1853 or 1854. McPhail's evidence says that the first improvement was made on the land in 1857. Neither of these witnesses for the plaintiff show by whom and under whom this land ceased to be vacant. Glenn states that he purchased the land in 1857 of the agents of Hennen, broke up the land, occupied for five or six months, and then surrendered the land to Hennen's agents. Moore says he sold the land in 1851 to Singleton, subject to confirmation; the sale was not confirmed and was canceled in 1861.

In August, 1857, he sold the land to A. A. Glenn, on the 9th of February, 1859, that sale was canceled. Singleton says in 1861 he sold McNitt a farm and quit-claimed this quarter to him. The fact of the sale having been canceled as between Singleton and Hennen, gave Singleton no right to possession under Hennen, and his quit-claim deed did not put McNitt into possession under Hennen. The possession during a series of years seems to have been rather confused.

I refer now to a stipulation herewith printed to supply the clerical omission to certify in the record a jurisdictional fact and the loss of a deposition. We expect no consent to attain jurisdiction, but the fact of value of land was proved—and the missing deposition was taken.

JACKSON GRIMSHAW,
Attorney for Plaintiffs in Error.

No. 479.

SUPREME COURT OF THE UNITED STATES.

Error to the Circuit Court of the United States for the Southern District of Illinois.

MARTIN MCNITT AND RODOLPHUS F. TAINTER, *Plffs. in Error*,
vs.
ASA TURNER, *Defendant in Error.*

It is stipulated that it was proved in the court below, that the land mentioned in the record herein and in question, was of the value of more than two thousand dollars, but which fact is omitted in said record, and such fact is to be taken as a part of said record, and that by the deposition of William Lee, read on the trial below and omitted in said record, he testified, that after Glenn was in possession of the land in controversy, in 1861 said McNitt took possession of it, and afterwards purchased the title proved on the part of plaintiffs in error, as shown by said record, and from thence claimed the land under said title and made improvements thereon,—and which is to be taken the same as if inserted in and a part of said record; and it is stipulated that this cause stand submitted, under rule No. 20 of said court, upon briefs of the respective parties, at the next term of said Supreme Court.

Dated November 25, 1872.

JACKSON GRIMSHAW,
Att'y for Plaintiffs in Error.

SKINNER & MARSH,
Att'ys for Defendant in Error.

No. 479.

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1873.

MARTIN McNITT AND RODOLPHUS F. TAINTER,
Plaintiffs in Error,

vs. } *In Ejectment.*

ASA TURNER, *Defendant in Error.*

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

BRIEF FOR PLAINTIFFS IN ERROR.

No. 479.

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1873.

MARTIN McNITT AND RODOLPHUS F. TAINTER,
Plaintiffs in Error,

vs. } *In Ejectment.*

ASA TURNER, *Defendant in Error.*

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

BRIEF FOR PLAINTIFFS IN ERROR.

Both parties claim the land by title purporting to be derived from Samuel Spotts, deceased; the plaintiff in error through a deed made by said Spotts in his lifetime, and the defendant in error through a deed, made after said Spotts' death, by his administrator.

It appears by a recital in the letters of administration, but not otherwise, that Spotts was a citizen of New Orleans, in the State of Louisiana, and that he died there; but when, does not appear, except that it was prior to the first day of January, 1836.

On the 24th of November, 1837, Archibald Williams applied to the Probate Court of Adams county, Illinois, and obtained letters of administration on said Spotts' estate.

On the 14th of September, 1838, said Williams, as such administrator, presented a petition to the Circuit Court of said Adams county, asking for a decree to authorize him to sell lands for the payment of the debts of the intestate. (The court is referred to the petition on page 15 of the printed record.)

This proceeding in the Circuit Court to enforce the sale of lands was wholly *ex parte*. The petition was exhibited against no one by name. No parties were made to it. It does not show when Spotts died, otherwise than by averring that it was before the first day of January, 1836. For aught that appears, it may have been ten or fifteen years before. It does not show who Spotts' heirs were, or where they lived, or what their ages were, or whether, in fact, he left any heirs. It is not averred, as required by the statute, that Spotts died *seized* of any real estate in the State of Illinois, but only that he died intestate, leaving, in this State, the real property described in the copy of the inventory marked "Exhibit A," and filed with the petition. No real estate is described in the petition, but reference is made to "Exhibit A" above mentioned.

The land in controversy is the south-east quarter of section four, in township one south of the base line, range four west of the fourth principal meridian, in Brown county, Illinois.

Upon reference to Exhibit A, it will be found that this particular piece of land is not included or described in it. "Exhibit A" includes a piece of land under the general and vague description of "S. E. 4, 1 S. 4 W." There is nothing more definite in any part of the proceedings. At the bottom of the notice which was given of the intended application for sale, is the statement, "All of the above land being recorded north *or* south of the base line, and east and west of the fourth principal meridian; but where the *land is situated* is not stated. The reference is only to the *recording of the deeds* (see printed record, page 17). The land was decreed against, advertised, sold, and conveyed by the administrator by the same description, "S E. 4, 1 S. 4 W."

The decree which was rendered upon the petition of the administrator will be found on pages 17 and 18 of the printed record.

It appears from that, that the heirs of Samuel Spotts, deceased, were infants. A guardian *ad litem* was appointed for them, but no answer was filed, nor does it appear that he was ever notified of his appointment. The decree was rendered on the same day on which the petition was filed. It authorized the administrator to sell the lands mentioned in the petition, and directed him, from time to time, to report his proceedings to the Court of Probate of Adams county. It gave no directions as to the time or place of sale.

The administrator made no report of sales until the 30th of August, 1851. (See printed record, pages 23, 24.) He then reported that he had, on the 17th day of June, 1839, in pursuance of the decree, sold thirty-one quarter sections of land, one of which was the "S. E. 4, 1 S. 4 W."

No information is given in the report, or elsewhere in the record, as to *where* the sale was made. The lands are scattered through fifteen or twenty counties. The sale may have been made in some one of them; or it may have been made in some other part of the State outside of them all; or, for aught that appears, it may have been made at some place outside of the State. For more than twelve years after the sale there was no record evidence that one had been made at all.

This brief history of the proceeding is given in the hope that it may aid the court in better comprehending the argument which is to be submitted upon it.

The entire record of the proceedings on the petition of the administrator for the sale of the lands, was offered in evidence on the trial; objected to by the plaintiff in error, who was defendant below; the objection overruled by the court; the record admitted and read in evidence, and an exception taken.

The first assignment of error is upon the admission of this record.

It is conceded that some of the defects, which appear in the record, are such as could be taken advantage of only in a direct proceeding upon appeal, or writ of error to reverse the decree, and they will not be urged upon the attention of the court. But there are others which go to the jurisdiction of the Probate Court to grant the letters of ad-

ministration, and to the jurisdiction of the Circuit Court to pronounce the decree; and these defects of jurisdiction render the proceedings of the courts void, and are available, as well collaterally, as upon a direct proceeding for reversal.

If the Probate Court of Adams county had no power or authority to appoint the person administrator of the estate of Samuel Spotts, deceased, who was appointed, its action was void; the person appointed would not be administrator, and could maintain no proceedings in the Circuit Court to enforce the sale of lands for the payment of the debts of the estate.

But, if the administrator was properly appointed, and could lawfully proceed to settle the estate, still, if the Circuit Court failed to get jurisdiction of the persons interested in the estate, and of the subject matter of this present suit, or of either of them, then its proceedings, so far as they purport to affect the subject matter of this suit, viz.: the south-east quarter of section four, in township one south of the base line, range four west of the fourth principal meridian, in Brown county, Illinois, were null and void, and, in either event, the record should have been rejected as evidence.

The attention of the court is invited only to such facts as are supposed to be jurisdictional; such errors only as render the proceedings void. Those which make them only voidable will not be discussed.

I. First, then, as to the power and authority of the Probate Court to appoint the administrator who was appointed.

The Probate Court of Illinois is a creature of the statute, and can exercise no jurisdiction or powers not authorized by the statute, and all acts in excess of such authority are void.

The intestate was a non-resident. He was a citizen of Louisiana, and died in that State. It does not appear that he had ever been in Illinois. Under such circumstances, what were the powers and duties of the Probate Court in respect to the appointment of an administrator? Just such as the law of Illinois declared them to be, and none others.

The 51st section of the statute relating to wills (Gale's Statutes of Illinois, 698) provides "that in all cases where the intestate shall have been a non-resident, *or* without a widow, next of kin, or creditors in this State, but having property within the State, administration shall be granted to the *public administrator* of the proper county, *and to no other person.*"

This is imperative. No discretion whatever is vested in the Judge of Probate. No latitude is allowed him. If the intestate be a non-resident, the Probate Judge can do one thing, and one thing only, in regard to the appointment of an administrator upon his estate, and that is to grant administration to the public administrator. There is no contingency in which he can make the grant to another. The statute is not only imperative that he shall do the one thing, but equally imperative that he shall not do the other. The appointment of any other than the public administrator was not within his jurisdiction. It was not a case in which he had a right to deliberate. It was not committed to him by the law to judge and determine. He could walk in the one path only, which the law had marked out, and when he stepped out of it, he was on forbidden ground. He had gone beyond the limit of his legal orbit, and any act he performed outside of it, was null and void. And it would not mend the matter to say that he may not have known the intestate was a non-resident. It was his business to know; and whether he did or not, the appointment was equally a violation of the law, and beyond his power. It was the duty of the applicant to have informed the judge of that fact; and, if he failed to do so, and, in consequence, obtained letters, that, of itself, would be a fraud which would render the grant void. It is the existence of the fact of non-residence, and not the judge's knowledge or ignorance of that fact, which takes from him the power to appoint any other than the public administrator. There was, at the time, a public administrator in Adams county, Illinois, and he alone was entitled to the administration of the estate. He was not appointed, but another was, who, under the law, could not be the administrator, and the appointment was, therefore, void.

It is true it does not appear in the record that there was a public

administrator in the county of Adams, but that is a fact of which the courts must take judicial notice. A public administrator for each county in the State was appointed by the Governor, by and with the advice and consent of the Senate.

Gale's Statutes of Illinois, 699, § 52.

The circuit court of Adams county, in which the petition of the administrator was exhibited, and by which the decree for the sale of the lands was rendered, was bound to take judicial notice who the public administrator of the county was, and that administration of the estate of the non-resident intestate had not been committed to him.

Stout vs. Slattery, 12 Ills., 163.

The court trying a cause will, *ex officio*, take notice of the civil officers of the county in which it holds its sittings.

Dyer vs. Flint, 21 Ills., 82.

A court is presumed to know its own officers, and all public officers in civil affairs, within its jurisdiction.

Thompson vs. Haskell, 21 Ill., 216.

Inasmuch then as Samuel Spotts, the intestate, was a non-resident, and inasmuch as the law was imperative, that, in case of non-resident intestates, administration should be granted to the public administrator, and to no other person, the letters in this case having been granted to another person, were absolutely null and void. They conferred no authority, and the circuit court acquired no jurisdiction of the estate by virtue of the petition exhibited by the party claiming under the void letters.

The petition, or one of the exhibits filed with and made a part of it, informed the court that the intestate was a non-resident, The court was bound to take judicial notice that the party claiming to be administrator, and applying for a sale of the real estate, was not the public administrator, and it should have proceeded no further. It should have declared the letters of administration null and void, and have dismissed the case.

All acts done by ministers of justice without authority are a nullity.

Case of the Marshalsea, 10 Rep., 76.

If administration be granted on the supposition that no will exists, and a will afterwards appear, all the proceedings under the administration are void.

Toller, 120.

And if the bishop grants administration, and there are *bona notabilia* in divers dioceses, such administration is absolutely void.

Prince's case, 5 Rep., 30.

So the grant of an original administration more than twenty years after the death of the intestate, is *ipso facto* a nullity.

Wales vs. Willard, 2 Mass., 120.

In this last case the court said, "This administration, it was not competent for any judge of probate to grant, but it is a case in which it is expressly provided by the statute from which he derives his authority, that no administration shall be granted. It is not, therefore, the erroneous exercise of his judgment, but it is an assumption of power against law, and the grant is *ipso facto* a nullity." 125.

So, too, in this case, the law from which the probate judge derived his authority, declared that no administration should be granted except to the public administrator. The appointment of another was not an erroneous exercise of judgment, but an assumption of power against law, and the grant was *ipso facto* a nullity.

In Holyoke vs. Haskins, 9 Pick., 259, the court held an administrator's sale of land void, more than twenty years after it was made, because the letters of administration had been improperly granted. The court said: "The inconvenience of vacating acts of a judicial nature, a long time after they have passed, is undoubtedly considerable; but if they are void, there seems to be no lapse of time which will make them valid." 263.

The same doctrine was held in Cutts vs. Haskins, 9 Mass., 543, and Holyoke vs. Haskins, 5 Pick., 24.

See also Sigourney vs. Sibley, 22 Pick., 507.

In Griffith vs. Frazier, 8 Cranch, 9, letters of administration, being *durante absentia* of the executor, and a sale by the administrator, were

declared void, more than twenty years having elapsed after the grant of administration and the subsequent sale.

The grant of administration being void, the case stands on the same footing as though no administration had been granted, and the pretended admistrator had acted without the semblance of authority.

II. All the proceedings in the circuit court of Adams county, to subject the land in controversy to sale, for the payment of the debts of the intestate, were void, for the reason that the law authorizes such proceedings only in respect to lands of which the intestate died seized, and it is shown, by the evidence in the case, that he did not die seized of this land.

Real estate can be converted into assets for the payment of the debts of a deceased person only by virtue of the provisions of the statute. It is strictly a statutory proceeding, and must be strictly pursued. If the statute had provided that only the real estate of which the deceased had the actual *pedes possessio* should be subject to conversion into assets by the administrator, it will hardly be questioned that a decree for the sale of other lands owned by the deceased, but of which he had only a constructive possession, would be void.

Neither the administrator, nor the courts, have any power for the conversion of the realty into assets beyond what they derive from the statute; and when the court oversteps the limits of the statute, and decrees the sale of land not subjected to sale by the statute, its action is simply void.

The 98th section of the statute provides "that when any executor or administrator, whose testator or intestate shall have died *seized* of any real estate in this State, shall discover that the personal estate is not sufficient for the payment of the debts, &c.," he may file his petition, setting forth that the personal estate is insufficient to pay the debts of the deceased, and ask the aid of the court in the premises; and the 99th section provides that if upon examination, the court shall ascertain that the personal estate is insufficient for the payment

of the debts, it shall order and direct the whole, or so much of *said* real estate as may be sufficient, to be sold, &c. (See Gale's Statutes, 711.)

If the testator, or intestate, was not *seized* of the land, then the court could have no jurisdiction of it in a proceeding to subject it to sale for the payment of debts; and unless the court had jurisdiction of the subject matter, as well as of the parties, its proceedings were void.

It is conceded that where the court has jurisdiction over the parties and the subject matter, acts performed and rights acquired by third persons under its judgment or decree, and while it remains in force, must be sustained, even though there may be a subsequent reversal. But, whether the jurisdiction existed, is always open to inquiry, as well in a collateral as a direct proceeding; and a purchaser of real estate at an administrator's sale is bound to see that the court ordering the sale has jurisdiction of the *subject matter* as well as of the person.

Myer vs. McDougall, 47 Ill., 279.

The court must have jurisdiction of the subject of litigation, or the power to adjudicate and determine the question in dispute will be wanting. If the court lacks such jurisdiction, its proceedings are void, and binding upon no person; but may be questioned in any proceeding, whether direct or collateral.

Morris vs. Hogle, 37 Ill., 153.

For proof that Spotts, the intestate, did not die seized of the land in controversy, the court is referred to the printed record, page 26; nor is it anywhere averred in the record of the proceedings in the Adams Circuit Court, to subject the land to sale, that he was seized of it.

The attention of the court will be more particularly called to this hereafter.

At present, the court is referred to the deed from the intestate to John Lucas, dated September 12, 1820, by which the land was conveyed to Lucas in fee simple, with covenants of general warranty. After that time Spotts was never seized of the land, and never claimed to be. He never afterwards exercised control over it, or paid taxes

on it. When he died does not appear, but subsequent to his death (how long we are not informed) one Duncan N. Hennen, who was a citizen of Louisiana, of which State Spotts was also a citizen, filed claims against the estate of the intestate in the Probate Court of Adams county, Illinois, and caused a large number of quarter sections of land to be sold for their payment, of twenty four of which quarters he himself became the purchaser.

But as the intestate was not *seized* of this particular quarter, the court had no power or jurisdiction to order it sold, and the purchaser could acquire no title. This is not a question of priority under the recording laws, but of power and jurisdiction in the court; and to hold that land of which the intestate was not seized, may be sold by his administrator for the payment of debts, is not to adjudicate, but to legislate.

The administrator can assert no greater right than his intestate might have done. The language of the Supreme Court of Illinois is, "That an administrator is authorized by statute, after he has exhausted the personal estate in the payment of debts, to apply to the Circuit Court, and obtain leave to sell so much of the real estate of which the intestate 'died seized,' as will be sufficient to discharge the residue of the debts."

Choteau vs. Jones, 11 Ill., 319.

The land in controversy was vacant and unoccupied till long after Spotts' death, so that at the time of his death he had no seizin of it, either actual or constructive. He had parted with his title, ceased to claim it, and surrendered all control over it. The *seizin* was in Lucas, and it could not, therefore, be subjected to the payment of Spotts' debts by his administrator.

It is no answer to this to say that, as the deed to Lucas was not on record, the seizin was apparently in Spotts. The power of the administrator to convert realty into assets is an extraordinary one, created by the statute, and must be exercised in conformity with the statute. Only such realty as satisfies the requirements of the statute can be converted; and that is realty of which the testator or intestate 'died seized," not that of which he died apparently seized. The law

requires a seizin in truth and fact, and not in seeming only; and to extend it, and apply it to lands of which a testator or intestate was only apparently, but not in reality, seized, is to amend it.

This is not to be answered by saying that the question of the seizin of the intestate has been adjudicated by the Circuit Court of Adams county, and is not, therefore, open to inquiry here. It has not been adjudicated, and could not have been, for it was not in issue before the court. The petition of the administrator did not contain the necessary statutory averments to give the court jurisdiction, and the court should not have proceeded with the case. The proceeding was wholly *ex parte*. The infant heirs were non-residents; were not made parties to the petition; were not represented before the court; and it is not probable the petition was ever read to the court, or that the court was aware of its deficiencies.

It may be useful to copy so much of the law as defines the powers and prescribes the duties of the administrator in this regard:

"When any executor or administrator, whose testator or intestate shall have died seized of any real estate in this state, shall discover or suspect that the personal estate of such testator or intestate is insufficient to pay the just claims against his or her estate, such executor or administrator shall, as soon as conveniently may be, make a just and true account of the said personal estate and debts, as far as he or she can discover the same, and shall make out a petition to the Circuit Court of the county in which administration shall have been granted, *stating therein what real estate the said testator or intestate died seized of*, or so much thereof as will be necessary to pay his or her debts as aforesaid, and to request the aid of the said court in the premises." (Gale's Statutes, 711, § 98.)

To give the court jurisdiction it was not only necessary that the intestate should have died seized of real estate, but also that the *administrator should distinctly state that fact in his petition to the court*, and identify the estate. That he did die so seized, and that the petition shall inform the court thereof, and identify the property of which he was so seized, are the foundation stones of the whole proceeding. They are jurisdictional facts, made so by the statute, and not to be

dispensed with. Without them the court cannot proceed to decree, for there is nothing for a decree to rest upon.

"Stating therein *what real estate* the said testator or intestate died *seized of*." This is, in fact, the only averment which the statute, in terms, requires to be made in the petition. The amount of debts, the insufficiency of the personal estate, &c., are all left to implication; but, as the realty is about to be converted into assets, this averment of seizin and identification of the estate is deemed so vital to the jurisdiction of the court, that the law, in express terms, requires it to be made in the petition. Now, as these are the only facts which the law says expressly *shall be in the petition*, if the court can say that they are not necessary to the jurisdiction and dispense with them, why may it not dispense with every other allegation, and allow the administrator to come before the court and orally ask for the sale of lands, and have it decreed accordingly? It will be answered that the law requires a petition to be filed, and that the court would have no jurisdiction to proceed without it. This is true, and, if a decree were made without a petition, it would be null and void.

But the law does not require, in any more positive and emphatic terms, that a petition shall be presented, than it does that, when presented, it shall contain the statement of the seizin, and a specification of the lands. The court has the same power to dispense with the one, that it has with the other; and the omission of the one is as fatal to the validity of the decree as the omission of the other.

It is not insisted that the precise words of the statute must be used, but it is urged, with all earnestness, that, to arrest the continual sacrifice of large and valuable landed estates of non-resident infants, the statute shall be substantially complied with, and that words shall be used in the petition which substantially amount to an averment of seizin and a description of the lands.

In the case of Smith vs. Hileman, 1 Scam., 324, the Supreme Court of Illinois, in a collateral proceeding, held an administrator's sale of land void, long after it had been made, for the reason alone that what the statute said should be done, had not been done.

The court said, the words of the statute are imperative. The rea-

son of this precision we are not at liberty to inquire into, nor what the supposed necessity may have been in the opinion of the legislature for its adoption; and then added: "A special power granted by statute, affecting the rights of individuals, and which divests the title to real estate, ought to be strictly pursued, *and should appear to be so on the face of the proceedings.*"

Now, the court will look through the petition and all the proceedings, inclusive of the decree, in vain, for any averment of seizin, or for any statement which implies or amounts to such averment.

The only statement in the petition touching the matter is, "That the said Samuel Spotts, heretofore, to-wit, before the 1st day of January, A. D. 1836, died intestate, leaving in this State the real property described in the copy of the inventory marked exhibit A."

This is so loose, vague and indefinite, that it might with equal ease be applied to all the real estate in Illinois. It might with equal literal truth be said that he died intestate, leaving in this State all the real property in Adams county.

It is not alleged that he was possessed of, or owned, the real property, one of which allegations would have been equivalent to an averment of seizin, and from the other of which his seizin might have been implied. But the language used in the petition is not the equivalent of the statutory requirement, and does not import seizin; and the petition does not, therefore, so conform, in its averments, to the essential requirements of the statute, as to give the court jurisdiction of the subject matter; and, not having jurisdiction, the decree of sale, the sale itself, and all the proceedings connected therewith, were null and void, and conferred no rights whatever upon Hennen, the purchaser.

The maxim of *caveat emptor* is one of almost universal application to judicial sales, and the purchaser must see to it that the court has jurisdiction of the parties and the subject matter, and that the essential requirements of the statute are observed. Then he is not affected by mere errors and irregularities. But, if the substantial demands of the statute have not been so met as to secure jurisdiction, he buys at his peril, and will take nothing by his purchase. The proceedings

are simply void, and will give him no protection either in a direct or collateral proceeding.

An administrator only sells the interest which was vested in the intestate, and he makes no warranty either for himself or the estate which he represents. The rule of *caveat emptor* is strictly applicable.

Bingham vs. Maxcy, 15 Ills., 296.

McManus vs. Keith, 49 Ills., 390.

The jurisdiction of the court is always open to enquiry. In this case the jurisdiction of the circuit court of Adams county over the land in controversy, depended upon Spotts' seizin. He was not in fact seized. The land was vacant, and the ownership in another. The petition of the administrator does not aver that he was seized; the decree does not find that he was seized. It only finds that the allegations of the petition are true. There was no adjudication upon the seizin, and it is now open to enquiry.

III. For still another reason the circuit court of Adams county was without jurisdiction to decree a sale of the land in controversy. To render the proceedings of the court valid and binding, it must have had jurisdiction of the land before decreeing its sale.

Among other things, essential to give that jurisdiction, it was necessary that the land should be brought before the court by apt and appropriate words of description, which would distinguish it from all other lands, and enable all persons to identify it by reference to such description alone, without recourse to extraneous evidence.

This was not done. The only description given of the land in the petition, the exhibit filed therewith, the notice, the decree of sale, the report of sale in any of the papers connected with the case, is as follows: "S. E. 4, 1 S. 4 W.," to which it is fair to add the words, "in the State of Illinois," as the petition states that Spotts "died intestate, leaving in this State the real property described in the copy of the inventory marked exhibit A."

The whole of the description, then, taken together and connectedly, is, "S. E. 4, 1 S. 4 W., in the State of Illinois." It was decreed

against by the same description; advertised for sale by the same description; and by the same description sold, and reported by the administrator.

Now, by what right does the purchaser of the "S. E. 4, 1 S. 4 W., in the State of Illinois," claim the "south-east quarter of section four, in township one south, range four west, in Brown county, Illinois?"

If the two descriptions necessarily mean the same thing, and must necessarily be applied to the same quarter section of land, and to that only, there will be no difficulty. But, do they? Could the marshal of the State, upon having a *habere facias* placed in hands for the delivery of the possession of the "S. E. 4, 1 S. 4 W., in the State of Illinois," give possession of the land in controversy? Clearly not. He would be bound to take notice that there was a quarter section of land in Washington county which satisfied all the calls of the writ, as fully and exactly as the land in Brown county, and he could deliver neither. He would be confronted with a patent ambiguity which would so vitiate the writ as to discharge him from the obligation to execute it.

The quarter section of land in Brown county not being embraced in the petition of the administrator, the court acquired no jurisdiction of it; and, not having jurisdiction, any decree which it might make against the land would be void. But the court made no decree against it, and did not assume to order and direct the sale of the land involved in this suit; nor did the administrator sell it; nor did he report that he sold it; nor did Hennen buy it. The decree was for the sale of the land mentioned in the bill, which was the "S. E. 4, 1 S. 4 W., in the State of Illinois," which may as well have meant the land in Washington, as the land in Brown county. So far as this land was concerned, the whole proceeding, the petition, decree, notice of sale, sale, and purchase, were all void for uncertainty. They were all tainted with a patent ambiguity, not susceptible of explanation, and were, consequently, void.

That the ambiguity exists cannot be questioned. The only inquiry is, whether it is latent or patent. If patent, it cannot be explained or removed, but renders the whole proceeding void. No rule of law is better settled.

It seems equally clear, that the ambiguity is patent. The rule is, that, if when the instrument is looked at in the light of all the circumstances of which the court must take judicial notice, the ambiguity is disclosed, it is patent. It is inherent in the instrument itself, and becomes apparent at once upon inspection. It does not exist outside of the instrument, and await development by evidence, but the court at once takes cognizance of it, before, and independent of the production of evidence.

The courts take judicial notice of the geographical facts and features of the country; of the States, and of the division of the States into counties and parishes; of the government surveys, and of the legal subdivision of the public lands into sections and quarter sections; and of the relative situation of quarter sections under the surveys.

Mossman vs. Forrest, 27 Ind., 233.

Atwater vs. Shenck, 9 Wis., 160.

Prieger vs. Exchange Ins. Co., 6 Wis., 89.

No base line, meridian, or county is mentioned in the description of the land in the proceedings in the Adams Circuit Court. But the court will take judicial notice that there are, in Illinois, different base lines and meridians, and that there is a quarter section of land in Brown county, and another in Washington county, which equally answers to the description given in the petition, and other proceedings, viz.: "S. E. 4, 1 S. 4 W., in the State of Illinois." Which was intended the court cannot tell. There is an ambiguity, but, as it was not raised by evidence, it cannot be removed by evidence. It is inherent in the description; is patent; and the decree and the sale are alike void. Suppose the proceeding to have been against "section ten, in the State of Illinois," and a decree and sale by the same description? Would it not be void for uncertainty, and could the ambiguity be removed by any amount of extraneous evidence? If it could, then all that has been said and written about ambiguities, and uncertainty in the description of premises, and the inadmissibility of parol explanations of written instruments, is unmeaning.

In the case supposed, the court would take judicial notice, in advance of evidence, that there were many sections ten in the State of

Illinois, and that without something added to make it more definite, the description was fatally defective. The ambiguity is patent, not raised by evidence, and not removable by evidence. The difference in the case supposed, and the one at bar, is a difference in degree, and not in nature. They are essentially of the same character; and if the one is patent, and incapable of parol explanation, so is the other. They are altogether unlike the illustrations of latent ambiguities put in the books. Blackacre is conveyed, and there are two estates of that name. But the name is private and arbitrary. It has no public sanction. It does not mark a geographical feature of the country. The courts take no judicial notice of the fact that there are two or more private estates designated by the same name. The court knows nothing of it, until it is revealed by extraneous evidence. On the face of the instrument the description is certain. The uncertainty is brought to the notice of the court, not by inspection of the instrument, but by evidence *dehors* the instrument, and may, therefore, be removed in the same way.

The rule that latent ambiguities may be explained, and that those which are patent may not, is clear; but there is some diversity in its application, growing out of the difficulty of distinguishing, at all times, the one from the other. Always, however, when the conclusion is reached that the ambiguity is patent, there is an end of the matter. No further inquiry is indulged. The decisions are uniform that it cannot be explained by extrinsic evidence.

The case of White vs. Hermann, 51 Ill., 244, which is the last case upon the subject of ambiguities which has been before the Supreme Court of Illinois, is peculiarly pertinent. A question, very similar to the one now before the court, arose in that case, and the court held, first, that it would take judicial notice of the public surveys of the lands; second, that if the ambiguity was patent, it could not be obviated by extrinsic evidence; and third, that the character of the ambiguity was to be determined by the ability or inability of a person, with a knowledge of the surveys, to locate the land by the aid alone of the description contained in the instrument. That if a surveyor, with the instrument before him, could locate the land with certainty,

that then there was no ambiguity; but if he could not thus locate it, then the ambiguity was patent, and not open to explanation.

The court said, if the land "is sufficiently described to enable a surveyor to locate it, then the instrument is good and binding; and this is a question for the jury, to be determined from the evidence, unless it is manifest from the instrument that it cannot be located. In reading the description of this land, it seems but natural for any one seeing the subject matter to which it relates, to supply the ellipses. It refers to the section, the quarter, the township by its number, and the meridian, but omits to say that it is north of the base line, or to say that it is of any range, but says it is "14 E. of 3d P. M." When we examine the map of surveys of the public lands, it is discovered that there is no township 38 south of the base line and 14 east of the third principal meridian. Were that meridian extended south thirty-eight townships, it would be found to reach the State of Tennessee, and some eighty or ninety miles east of its western boundary. And we must take notice that government has made no surveys of lands in that State. It must then be 38 north of the base line, and in range 14 east of the third principal meridian, which would locate the land in Cook county. If this is an ambiguity at all, it is a *patent one, and would be incapable of an explanation by extrinsic evidence.* * * * In this case, by a reference to the land surveys made by the general government, we can see that there is a tract of land in Cook county which may answer the description, *and there can be no other.* Although the description is not as full as it could have been made, we must conclude that it was intended to be embraced in the agreement. Hence we have no doubt that the land can be located by the description contained in the agreement sued upon in this case."

The rule here laid down is clear, sensible, and certain. There is no obscurity about it. It is easily understood and easily applied. Apply it to the case under consideration and it concludes it. The description is: "S. E. 4, 1 S. 4 W., in the State of Illinois." No base line, no meridian, no county. Give it to a surveyor, and tell him to locate the land, and he cannot do it. The moment he looks at the surveys of the public lands, he sees that there are two quarter sections

of land in Illinois, which equally answer the description: one in Brown, and the other in Washington county; and he cannot decide between them. It may be the one or the other, but which, it is impossible for him to tell. The ambiguity is patent and cannot be removed. The land cannot be located. The Circuit Court of Adams county never had jurisdiction of the quarter section of land in Brown county, now in controversy, and all its proceedings, so far as they are intended to affect it, are null and void.

The cases of Voorhees vs. Bank of the United States, 10 Pet., 449, Grignon's Lessee vs. Astor, 2 How., 319, and Florentine vs. Barton, 2 Wall., 210, decided by this court, have not been overlooked. No question decided, or principle settled in those cases, is re-opened or re-argued here. In them all, the courts, which pronounced the decree of sale, had jurisdiction of parties and subject matter; and having jurisdiction, had the undoubted right to hear and adjudicate all questions which arose. The real estate in all those cases was brought distinctly before the court, by words of apt description, which distinguished it from all other property. And in no other way could the court acquire jurisdiction. A description which left it altogether uncertain which of two pieces of land was intended, could give the court no power to decree the sale of either of them. A description which was alike applicable to a quarter section of land in Brown county, and a quarter section in Washington county, would give the court just the same right to decree the sale of that in Washington as that in Brown. It would have no jurisdiction of the subject matter in either county, and could decree against neither.

So too, in the cases above referred to, the seizin of the property was distinctly brought before the court, and passed upon. Here, it was not averred, as expressly required by the statute, and could not have been decided. In those cases, as the courts had jurisdiction, both of parties and subject matter, whatever errors were committed could be re-examined only in a direct proceeding for reversal.

In this case, neither the quarter section of land in Brown county, nor the seizin of the intestate, were before the court, and could not be, nor were they, adjudicated upon. The court found only that the

allegations of the petition were true, and it contained no allegation upon either of these subjects. They were jurisdictional facts, and are as open to inquiry and re-examination here collaterally, as they would have been upon appeal or writ of error from the decree of sale.

IV. A separate examination of the 2nd, 3rd, 4th, and 5th errors assigned upon the record, is not deemed necessary. All questions sought to be raised by them are involved in the preceding discussion, and are submitted without further elaboration.

O. H. BROWNING,

For Plaintiffs in Error.

No. 479.

SUPREME COURT OF THE UNITED STATES.

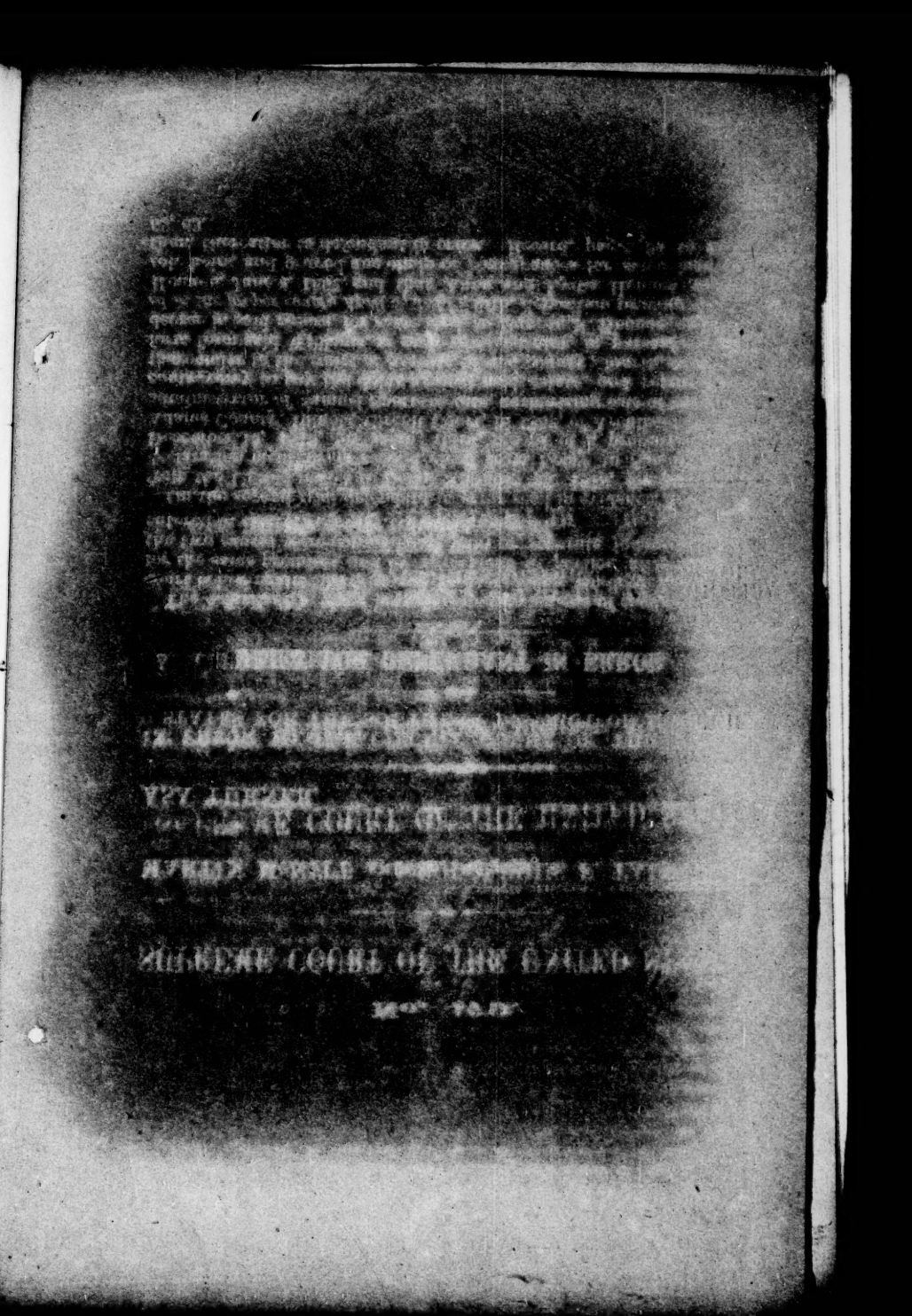
MARTIN McNITT AND RODOLPHUS F. TAINTER,

vs.

ASA TURNER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

BRIEF FOR DEFENDANT IN ERROR.



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BRIEF FOR DEFENDANT IN ERROR.

The defendant in error brought separate actions of ejectment in the court below against McNitt and Tainter, being landlord and tenant, for the same premises, and by agreement of parties, after one trial, the two causes were consolidated, joint or separate judgments to be entered in case of recovery. Record, page 31.

On the second trial defendant in error read in evidence, first, patent from the United States to Lefay, October 23, 1818, for premises in declaration mentioned; second, deed from Lefay to Samuel Spotts, December 19, 1818, for same; third, record of a proceeding in the Adams County, Illinois, Circuit Court, in 1838, of Archibald Williams, administrator of Samuel Spotts' estate, authorizing sale of the land in controversy to pay the debts against said estate, and report of sale thereunder to the court of probate of said county; fourth, deed in due form from said Williams, as such administrator, in pursuance of the decree in said record, for same land, to Duncan N. Hennen, *and recorded in the proper county April 3, 1841;* fifth, deposition proving death of Hennen, June 4, 1867, and that Anna and Lydia Hennen were his sole heirs, and proved due chain of conveyances for same land from them thereafter to defendant in error. Record, pages 34 to 48 and 62, 63.

Defendant in error also proved, first, that the land was *vacant and unoccupied* from 1840 to 1850, and that Duncan N. Hennen paid the taxes on the same from 1839 to 1849, and from thence to 1868. Record, pages 48 to 57.

Second, that in 1857 Hennen sold, by contract for conveyance, the land to one Glenn, who then took possession under his contract and cultivated and harvested a crop of wheat on same, and in 1859 rescinded his contract and surrendered same and the land to Hennen, by mutual arrangement. Record, pages 53 to 55 and 60.

Third, that Hennen, March 15, 1851, by his agents, bargained the same land to one Singleton, *subject to confirmation of Hennen*, that Hennen did not confirm the sale, but that same was canceled in 1861, and that Singleton, having possession of the land under Hennen, in 1861 made a quit-claim deed for same to said McNitt, informing him that he, Singleton, had no other right than as above stated to same, and that McNitt then took possession of the land. Record, pp. 60, 66, 67. And proved that said Samuel Spotts had a list of lands, of which this was one, and for which witness was agent at Quincy, Illinois, for many years, both for Spotts and for Hennen after his purchase, lying in the Military Tract of Illinois, and that Spotts was not known to have any other lands than those in such Military Tract, and that the lands sold by the administrator were of that list and were in said Military Tract. Record, pages 57, 58, 59.

Plaintiffs in error set up title paramount by deed from said Spotts, September 12, 1820, *recorded January 2, 1864*, to John Lucas, a chain of deeds from John Lucas to Booth Nettleton, and a deed from said Nettleton to said McNitt, May 23, 1864, all recorded in 1864.

Also, by a chain of deeds through persons *claiming* to be heirs at law of said Samuel Spotts to said McNitt, September 10, 1863, and all recorded in 1864. Record, pages 68 and 74.

Defendant in error therefore was entitled to recover upon two grounds:—

First. He proved title paramount, if the Circuit Court of Adams County, Illinois, had jurisdiction to make the order of sale under which the administrator of said Spotts sold and conveyed the land to Hennen, through whom plaintiffs in error derived title.

The statutory provisions in such case are:—

"Sec. 103. When any executor or administrator, whose testator or intestate shall have died seized of any real estate in this State, shall discover that the personal estate of such testator or intestate is insufficient to pay the just claims against his or her estate, such executor or administrator shall, as soon as conveniently may be, make a just and true account of the said personal estate and debts, as far as he or she can discover the same, and shall make out a petition to the circuit court of the county in which administration shall have been granted, stating therein what real estate the said testator or intestate

died seized of, or so much thereof as will be necessary to pay his or her debts as aforesaid, and request the aid of the said court in the premises; and it shall also be the duty of such administrator or executor to give at least thirty days' notice of the time and place of presenting such petition, by serving a written notice of the same, together with a copy of said account and petition, on each of the heirs or their guardians or devisees of said testator or intestate, or by publishing a notice in the nearest newspaper for three weeks successively, commencing at least six weeks before the presenting of said petition, of the intention of presenting the same to the circuit court, for the sale of the whole or so much of the real estate of the said testator or intestate as will be sufficient to pay his or her debts, and requesting all persons interested in said real estate to show cause why it should not be sold for the purposes aforesaid."

Section 104 provides that the court shall examine the allegations and proofs, and if it appear that the personal estate is insufficient to pay the debts, the court shall direct the sale.

Section 105 provides that the conveyance made under the order of sale shall be effectual against all claiming through the intestate or his heirs.

Section 106 provides how the sale shall be made, imposes a penalty for selling contrary thereto, and declares that no irregularity in the sale shall affect the validity of the title.

Revised Statutes of Ills. of 1845, pp. 558, 559, §§ 103, 104, 105, 106.

The notice of intended application for order of sale is in strict conformity with the statute and describes the several tracts of land, *giving the meridian* with legal certainty. The word "*recorded*" in description of the meridian is evidently a clerical mistake and as such will be rejected as surplusage, leaving the sentence perfect and the description exact, and the notice was published for more than the statutory period required. But were the notice in the record defective, the petition states what the statute requires and the order of sale expressly finds *that the allegations of the petition were true and that due notice had been given of the application for the order*, and this finding, in a *collateral* proceeding, concludes all. Exhibit "C," filed with the petition and made a part of it, shows debts of the estate over personal assets to the amount of $19,000, and makes the petition certain in that averment.

The Supreme Court of Illinois has repeatedly held, that in case of administrator's sale of land, if jurisdiction in the court appears, no error or irregularity in the proceedings will affect the title of the purchaser, and always has indulged in liberal intendments in favor of the jurisdiction.

In Moore vs. Neil, 39 Ill., 256, that court held that though the notice contained in the record was defective, a recital in the decree that it appeared that notice had been given according to law, was sufficient to give jurisdiction.

Irregular appointment of administrator, irregular sale, or different description of the property in decree from that in petition, will not affect title of purchaser.

Schnell vs. Chicago, 38 Ill., 382.

A notice without date and without giving the *State* of the court, held sufficient; and that a wrong address of petition or want of guardian *ad litem* would not affect validity of title.

Goudy vs. Hall, 36 Ill., 313.

Recital of service of process in decree conclusive in collateral proceeding.

Banks vs. Banks, 31 Ill., 162.

A notice which gave no *State* of the court, nor description of the property, nor names of heirs, held sufficient to give jurisdiction.

27 Ill., 88, 92.

Jurisdiction of the court by notice and petition appearing, the sale will be valid, no matter what error or irregularity intervene.

Stow vs. Kimball, 28 Ill., 93.

Reference to schedule for amount of indebtedness of the estate, sufficient.

Cromine vs. Tharp, 42 Ill., 120.

In Dougherty vs. Purdy, 18 Ill., 206, the deed described the land, *omitting county and meridian.* The court held parol proof admissible to show the land intended to be conveyed—to apply the conveyance to the fourth principal meridian—and to show what land the grantor claimed.

The record shows that this land was conveyed to Samuel Spotts in 1818, that he paid taxes on it, and had a list of lands, of which this was one, in the Military Tract of Illinois—fourth principal meridian—and was not known to have or claim any other lands. Had this decree been his deed, he would have been presumed to have intended to convey the land he in fact owned and claimed—this tract—and the decree and administrator's deed stand for his deed with like intendment.

Parol evidence admitted to identify premises described in a mortgage, and held that where some part of the description is subordinate and incorrect, it may be rejected as *surplusage*, leaving perfect description.

Myers vs. Ladd, 26 Ill., 417.

Though the *meridian* is omitted in the petition, the order finds due notice given, and orders sale of the lands, and the notice—a part of the record and upon which the court on the hearing acted—describes the same fourth sections of land in the petition set forth, and locates them as of the *fourth* principal meridian.

After the lapse of more than thirty years from this sale, as in this case, continuous claim under it, and payment of taxes, courts will be liberal in intendments in support of the title derived through it, and especially as against newly discovered deeds, first recorded in 1864.

The notice, the petition, the exhibits, and the order of sale will be taken together, and if, on inspection, a substantial description of this land is found in any of them, it is enough, even without the aid of facts *aliunde* showing that this tract of land was intended by the petition, order, and administrator's deed.

In further support of our position that jurisdiction appears from the record, and that the intendments of law are in favor of the title under the judicial sale, we refer to—

Buckmaster vs. Jackson, 3 Scam., 104.

Wells vs. Mason, *ibid.*, 84.

Kennedy vs. Greer, 13 Ill., 432.

In case of administrator's sale of land, if the record shows petition filed and order of sale, it will be presumed that all facts were proved necessary to give jurisdiction and to authorize the order.

Grignon's Lessees vs. Astor, 2 How., 319.

In Florentine vs. Barton, 2 Wallace, 210, this court hold that in case of administrator's sales in Illinois of decedent's estate to pay debts, that it is enough to sustain title under such sale that an order of the court authorizing the sale appear, and that in such case, especially after great lapse of time, everything necessary to give jurisdiction and justify the order will be presumed, pp. 215, 216.

In Cooper vs. Reynolds, 10 Wallace, 308, this court say, that defective or irregular affidavit and notice in case of attachment, *in rem*, do not affect the validity of the judgment.

Voorhees vs. Bank of the United States, 10 Peters, 449.

But we submit that this order of sale would not be reversed for error in a direct proceeding for that purpose.

II. As to the refusal of the court to charge the jury that no title passed under the administrator's sale and deed to Hennen, because of the deed of Spotts to Lucas, of date September 12, 1820, and *recorded January 2, 1864*, we submit there is no error, on account of the operation of the registration laws of Illinois. The statute then and now in force is as follows:

"Sec. 23. All deeds, mortgages, or instruments of writing, which are required to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all *creditors* and *subsequent* purchasers, without notice, and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers, without notice, until the same shall be filed for record."

And the preceding section 22 provides that "deeds and other instruments relating to or affecting the title to real estate, shall be recorded in the county in which such real estate is situated."

Revised Statutes of Illinois of 1845, page 108, §§ 22 and 23.

And the courts of Illinois apply this statute to all conveyances of land, whether by private or judicial sale.

In Martin vs. Dryden, 1 Gil., 187, the Supreme Court of Illinois decide that where a creditor in proceedings in attachment gets a levy of the writ on land, without notice of a prior unrecorded conveyance of the creditor, the same may be sold after judgment on execution, without the title being affected by notice of the prior deed after the levy.

So in case of judgment and execution at common law.
Cook vs. Hall, 1 Gil., 575.

In Choteau vs. Jones, 11 Ill., 300, the same court say that the Illinois registry laws apply to all conveyances of land; that deed from the heir, without notice of a prior unrecorded deed from the ancestor, will pass the title to the grantee of the heir; that these laws apply to conveyances under judicial sales, and decided that an administrator's deed took precedence of a prior unrecorded deed of the intestate and carried the title, pp. 320 to 323.

In Kennedy vs Northrop, 15 Ill., 148, the same court decide that, under the operation of the statutes of Illinois, a conveyance from the heir, without notice of a prior unrecorded deed of the ancestor, carried the title as against the prior deed. Page 154 to 157, where the question is fully discussed.

Also, Brookfield vs. Goodrich, 32 Ill., 363.

In Curtis vs. Root, 28 Ill., 367, held that a purchaser at a judicial sale is chargeable with such notice of prior encumbrance only as appears of record.

In Bowery vs. Prout, 52 Ill., 354, held that an heir who in partition with his co-heirs had given other land in the partition for their interest in the land in question, without notice of a prior unrecorded deed for it of the ancestor, was protected against the prior deed to the extent of the interest therein so acquired from his co heirs.

By force of the registry statute, Spotts "died seized" of the land as to creditors and purchasers, without notice of the prior unrecorded deed of Spotts. The creditors had a lien on the land for payment of their claims, and Hennen purchased, took his conveyance, and paid for the land sold to satisfy those claims, without notice of the prior deed of Spotts, had his deed duly recorded in 1841, and the deed from Spotts was not recorded until 1864. Record, pp. 45, 68, and see report of sale under the express direction of the order of sale, record, pp. 62, 63.

The judicial sale did what the intestate could have done, had he been living, and in contemplation of law is the same as his deed. The administrator's deed affected real estate, was without notice of the prior unrecorded deed, and for value paid, and hence, by the very words of the statute, took effect from the recording of the same, and precedent to the prior unrecorded deed. The language of the statute authorizing administrator's sales of land will be taken and construed in connection with the registry statute, so that both have harmonious operation.

III. The defendant in error was entitled to recover aside from proof of paramount title derived from the United States.

He proved by administrator's deed to Hennen color of title made in good faith, and he proved payment of taxes under the color for seven successive years, while the land was vacant and unoccupied, and possession taken and enjoyed under it. The possession of Glenn, who contracted for the land of Hennen in 1857 and occupied it and canceled his purchase in 1859, was the possession, in law, of Hennen, the vendor; and defendant in error coming to the Hennen title, could maintain ejectment to recover that possession, when another had obtained it.

So Singleton was in possession in 1861 under a canceled contract o purchase from Hennen, and, claiming no title, released to McNitt, who took possession, bought the adverse claim to the land, and set it up as paramount title.

See depositions of Sherman, Moore, Glenn, McPhail, Long, and Singleton. Record, pp. 48 to 61 and 66.

This is the law of the Supreme Court of Illinois.
Paulin vs. Hale, 40 Ill., 274.

The deposition of William Lee, read on the trial and omitted in the record, but made part of the record by stipulation, shows that Lee testified that after Glenn was in possession of the land in 1861, said McNitt took possession of it, and afterwards purchased the title proved on the part of the plaintiffs in error, as shown by the record, and from thence claimed the land under said title and made improvements thereon.

SKINNER, MARSH & FROST,
For Defendant in Error.

No. 479.

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1873.

MARTIN McNITT AND RODOLPHUS F. TAINTER,
Plaintiffs in Error,

vs. } *In Ejectment.*

ASA TURNER, *Defendant in Error.*

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

No. 479.

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SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR,

The Original having been prepared before seeing Briefs for Plaintiffs in Error.

I. The brief of Mr. Grimshaw assumes that the record of the administrator's sale shows, that Archibald Williams, the administrator, was appointed under a statute with power to *preserve* only the estate, and that this appears from his letters of administration, made a part of the petition. This is a simple mistake. The letters of administration accompanying the petition as exhibit "B," (record, page 39) are a literal copy of the statutory form given for general letters of ad-

ministration, in contradistinction to special letters for the temporary purpose of preservation of the estate.

Revised Statutes of Illinois of 1845, page 550, § 66; and in the Statute of Wills in force, July 1, 1829, Gale's Statutes of Illinois, page 702, § 62.

The letters of administration set forth in Mr. Grimshaw's brief (page 3) are not of the import of the letters accompanying the petition, but, on the contrary, are copied from the form given by statute for letters of a special character, or to preserve the estate only, as found in the first above statutes, page 543. § 36, and in the latter statutes, pages 693, 694, § 31.

Thus the misapprehension of the counsel is apparent, but were he correct, the order of sale would be conclusive on this question, as well as all other questions upon which the court had power to adjudicate.

II. Mr. Grimshaw is again mistaken (his brief, page 13) in supposing that the registry laws of Illinois, relating to land and quoted in our original brief (page 5), were not the same at the time of the sale and conveyance under the decree in this record, and at the time of the recording of the deed of the administrator, in 1841. The law on this subject has remained unchanged since 1833, as it stands in the Revised Statutes of Illinois of 1845.

The act entitled "An act abolishing the office of State Recorder," approved January 13, 1833, provides that "all deeds and other title "papers, which are required to be recorded, shall take effect and be "in force from and after the filing of the same for record, and not "before, as to all *creditors* and subsequent purchasers, without notice, "and all such deeds and title papers shall be adjudged void as to all "such *creditors* and subsequent purchasers without notice, until the "same shall be filed for record in the county where the said lands "may lie." And the 2d section required the recording of all deeds for land in the county where the lands lay.

Real Estate Statutes of Illinois, by Purple, pages 488, 489, §§ 2, 5.

And this law was continued by the revision of 1845, as in our original brief quoted, so that at the time of this sale by the administrator and the recording of his deed, and hence hitherto, the same statutory provisions have existed in Illinois, as a rule of property founded upon public policy for the security of estates and protection of the public against dormant titles.

III. The language of the petition, that Spotts "*died leaving the lands*" in this State mentioned in the schedule, a part of the petition, and fully described (with meridian) in the notice, a part of the record, and by the decree found to have been duly published,—is equivalent to the words of the statute, "died seized," and can sensibly be construed as meaning nothing else.

It is absurd to say, that jurisdiction of the court depended upon the deceased being seized of the land either *in fact* or in fee simple, and that the fact may now be proved to defeat jurisdiction. Such a rule would defeat jurisdiction in multitudes of cases by facts *aliunde* the record, and titles honestly acquired under judicial sales, and the entire policy of our registry laws.

But, if such seizin were necessary, it will be presumed in favor of a court of general jurisdiction, that it was proved. If there was a title appearing in the intestate, which under the law another could acquire by his deed made in life—a thing vendable under the operation of the law—judicial sale under order of a competent court would do the same as the deed in life of the intestate.

The word "owners" of land, in a statute, construed to include those having an equitable interest.

Danforth vs. Sydam, 4 N. Y. R., 66. 68, 69, 70.

IV. It is a misapprehension that the deed of the administrator did not give full and perfect description of the land. This was one of the deeds in the chain of title of defendant in error, and the record states that this deed was "for the same land"—the land in controversy. Record, page 45.

The brief description "S. E." for "south-east," &c., is common and well understood under our system of government surveys, and aside from the parol proof and record evidence of what land was owned by Spotts, and intended by the proceeding and conveyance under it, the notice, the foundation of the proceeding, gives with evident certainty the meridian to which the description applies.

The whole record will be taken together for construction, if there be uncertainty in any part.

V. To the objection, that the Circuit Court had no jurisdiction to make the order of sale, because it is recited in the letters of administration that Spotts, the intestate, was "of the" "State of Louisiana," and that it does not appear by the record that Archibald Williams was a public administrator, we answer, the word "*or*," as used, means "and," according to the reason of the statute, otherwise it would be absurd and in conflict with the other provisions of the same section, giving successive right of administration to husband, widow, next of kin and creditors of the intestate, and against uniform usage in this State.

Gale's Statutes of Illinois, 698, § 51.

Said § 51 is as follows: "Administration shall be granted to the "husband upon the goods and chattels of his wife, and to the widow "or next of kin to the intestate, or some of them, if they will accept "the same and are not disqualified; but in all cases the widow shall "have the preference, but if no widow, or other relative of the intes- "tate, shall apply within sixty days from the death of such intestate, "the Court of Probate may grant administration to any creditor or "creditors, who shall apply for the same; and in case no such appli- "cation be made by any creditor or creditors within fifteen days next "ensuing the lapse of the said term of sixty days, as aforesaid, ad- "ministration may be granted to any person or persons who the "Judge of Probate may think will best manage the estate, and in "all cases where such intestate shall have been a non-resident, or "without a widow, next of kin, or creditors in this State, but having "property within this State, administration shall be granted to the "public administrator of the proper county, and to no other person."

And upon the construction contended for, if the intestate be a non-resident of the State, and *either* widow, next of kin, or creditors, be non-resident, *neither* could administer, although resident in the State; in other words, unless *all* such classes of persons reside in this State, none of them could administer.

The rule is too familiar to require citation of authorities, that in statutes "*or*" will be taken to mean "and," and "and" "or," according to the general sense and purpose of the statute.

Schuyler Co. vs. Mercer Co., 4 Gill., 20, 23, 24

Burns vs. Henderson, 20 Ill., 264, 265.

But it does not appear that Williams was not public administrator. If the law required that such officer should administer, the court is presumed to have appointed him, and nothing in the record shows to the contrary. The form of the letters of administration in each case is the same.

Statutes, Laws of Illinois, by Gale, page 702, § 62, above.

But, in law, the court is presumed to have had proof of such facts as were necessary to make the order, its power being properly put in motion to adjudicate.

SKINNER & MARSH,

For Defendant in Error.